United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

ORIGINAL

75-7295

To be Argued
LEWIS HARRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHERYL PERRY HULL, THELMA LINDO, VICTORIA RAPHAEL, LURLINE RUTHERFORD and ANSONIA LEWIS, for themselves and all persons similarly situated,

Plaintiffs-Appellants,

—against—

A-T-O, INC., FAMILY BUYING POWER, INC., NATIONWIDE PROMOTIONS, INC., EXECUTIVE BUYING POWER, INC., FAMILY CLEANING POWER, INC., COMPACT ASSOCIATES, INC., COMPACT BELLEROSE, INC., COMPACT ELECTRA CORP., HYMAN SINDELMAN, a/k/a HY DELMAN, M. ROBERT DORTCH and FRANK DORTCH,

Defendants-Appellees.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLEE A-T-O, INC.

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Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE A-T-O, INC.

Statement of Issues

1. Did the court below properly require allegations of actual coercion and some proof thereof in order for plaintiffs to sustain a claim of an illegal tie-in arrangement under Section 1 of the Sherman Anti-Trust Act?

2. Can plaintiffs sustain a claim of a *per se* violation based merely upon claims of fraudulent misrepresentations as to the uniqueness of the tying product?

3. Can plaintiffs prevail in their claim of a *per se* violation in the absence of demonstrating uniqueness of the tying product and in the absence of requisite market power?

4. Can a defendant who has no business dealings with his co-defendants relevant to the issues in the case be charged with violations of the anti-trust law based upon actions of his co-defendants?

5. Can a case involving the oral representations of 800 salesmen to 10,000 people be said to have predominant questions of fact sufficient to sustain a certification under Rule 23?

Statement of the Case

This is an action brought by the plaintiffs under the federal antitrust laws, 15 U.S.C. §§ 1, 15 and 26, and 28 U.S.C. § 1337, on behalf of themselves and as representatives of a class of persons who purchased a vacuum cleaner from the defendants Compact Electra Corp., Compact Associates, Inc. Compact Bellerose, Inc., Compact Discount, Inc. and/or Herman Sindelman, (Compact defendants), and who, pursuant to said purchase, were given free, a one year membership in a buying program operated by the defendants Family Buying Power, Inc., Nationwide Promotions, Inc., Executive Buying Power, Inc., Family Cleaning Power, Inc., M. Robert Dortch and Frank Dortch (FBP defendants). The plaintiffs contend that the sales program engaged in by the Compact defendants, wherein they give away free to persons purchasing their vacuum cleaners a one year membership in the defendant FBP's buying program, constitutes an illegal tying in violation of the antitrust laws. A-T-O, Inc., the manufacturer of the vacuum cleaners sold by the Compact defendants, is also named as a defendant in the action.

Statement of Facts

This action was brought by the plaintiffs under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) and Section 1 of the Sherman Act (15 U.S.C. 1). By their complaint plaintiffs seek injunctive relief and treble damages for themselves and on behalf of some 10,000 consumers who, from March 20, 1969 through December 3, 1973, entered into contracts with the defendants Compact Assoc. Inc., Compact Bellerose Inc., Compact Electra Corp. (collectively referred to as the Compact defendants) for the purchase of vacuum cleaners. In connection with the purchase of said vacuum cleaners and the Compact defendants gave each purchaser a one year *free* membership in buying programs of the defendants Family Buying Power, Inc., Nationwide Promotions Inc., Executive Buying Power and Family Cleaning Power Inc. (collectively referred to as the FBP defendants).

Defendant A-T-O

The defendant, A-T-O Inc., through its division Interstate Engineering, manufactures vacuum cleaners and vacuum accessories. A-T-O sells its vacuum cleaners to its independent distributors pursuant to written distributor contracts (D.A. 73).[1]

The Compact defendant, as an independent distributor, purchased vacuum cleaners from A-T-O at wholesale prices (Ex. 6—D.A. 73). The independent distributor contract between A-T-O and the Compact defendants provides for an outright sale of A-T-O's vacuum to Compact,

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[1] As an aid to the Court defendant A-T-O has printed certain relevant documents as an Appendix to its brief. "D.A." references herein are to said Appendix.

with title to the goods passing for the Compact defendants upon the shipment of the goods (Ex. A—D.A. 73). Thus, once the vacuum cleaners are shipped to the Compact defendants, A-T-O had neither legal or equitable interest in the product nor did it exercise any control over the subsequent retail sales of the product to the general public (Pl[illegible]' Exhibit A, to Aff'dt of Douglas A. Scherman, D.A. 75).

In the Winter of 1967, as part of a nationwide sales promotion, A-T-O had purchased, directly from the FBP defendants, membership certificates in the defendants' program, which A-T-O in turn offered to its distributors (D.A. 59). A-T-O did not require its distributors to purchase said memberships or participate in the sales promotion program (D.A. 61). In early 1968, the Federal Trade Commission questioned the propriety of the aforementioned sales promotion. A-T-O met with the Commission's staff, and having been unable to reach an accord with the F.T.C. as to the manner in which the sales promotion was to be carried out, A-T-O decided to completely abandon the project (D.A. 59). By memo dated November 22, 1968, A-T-O notified all of its distributors that it was terminating the sales promotion and instructed all of its distributors "to completely discontinue, not later than November 26, 1968, any further use of the Family Buying Power, Inc. program in connection with the sale of Compact Vacuum Cleaners" (D.A. 59, 66).

The plaintiffs herein are some 10,000 members of an alleged class of persons in the New York metropolitan area who, "between March 20, 1969 and December 3, 1973", purchased vacuum cleaners and accessories from the Compact defendants and received membership in the FBP defendants' buying program (Plaintiff's Brief, p. 7). Notwithstanding the uncontroverted evidence that the defendant A-T-O had terminated its relationship to the FBP

defendants prior to March 20, 1969 and had directed its distributors, including the Compact defendants, to discontinue use of the FBP membership as part of any sales promotion, the plaintiffs, in their Amended Complaint have continued to name the defendant A-T-O as a party to this action, and continue to claim the existence of some vague conspiracy among A-T-O and the Compact defendants and FBP defendants.

The plaintiffs accuse the defendant A-T-O of improperly entering into an agreement in September of 1967 with the defendant FBP pursuant to which the defendant A-T-O is alleged to have required its distributors to accept and use the defendant FBP buying plan in connection with the promotion and sale of A-T-O's vacuum cleaners (¶22 of Amended Complaint D.A. 22). It is further alleged that, pursuant to this agreement between A-T-O and FBP, it was the intent of the parties that the Compact defendant, who sold the defendant A-T-O's vacuum cleaners to the retail buying public, would tie the sale of A-T-O's vacuum cleaner to the sale of FBP buying plan. Moreover, it is claimed that the buying plan was misrepresented, apparently by the defendant Compact's salesmen, as being given away "free and without charge" to those customers who purchased a vacuum cleaner (¶12 of Amended Complaint D.A. 22). By this action the defendants are alleged to have foreclosed competitors from the relevant market, which plaintiffs define to be "the door-to-door sales market for vacuum cleaners" (¶26 of Amended Complaint D.A. 23). Thus, plaintiffs conclude that the alleged actions of the defendant results in an unreasonable restraint of trade in violation of the Sherman Anti-Trust Act.

The defendants have denied plaintiffs' claims that they have engaged in any conduct in violation of the anti-trust laws. (See, Answer of defendant A-T-O, D.A. 31 et seq.).

As heretofore noted the defendant A-T-O, through Robert W. Limacker, President of Interstate Engineering, the division of A-T-O which manufactures the vacuum cleaners and accessories, submitted to the District Court uncontroverted evidence to establish the fact that A-T-O had by December 1968 terminated any and all of its business dealings with the FBP defendants. Further, in November 1968, A-T-O sent a written directive to all of its distributors, directing them to discontinue the use of defendant FBP buying service in connection with the sale of its vacuum cleaners (See, aff'dt of Robert Limacker, D.A. 58 *et seq.*). A-T-O also provided the court below with statistical data to establish the fact that the sale of vacuum cleaners by the Compact defendant were not a substantial part of A-T-O's overall operation and further that the defendant A-T-O did not exercise control over a substantial share of the door-to-door vacuum cleaner market (Exs. D & E of Limacker Aff'dt, D.A. 70 *et seq*). It is therefore apparent that the defendant A-T-O engaged in no activity directed toward monopolizing the door-to-door vacuum cleaner market or unreasonably restraining competition in said market.

The FBP Defendant

The FBP defendant, through unrelated independent distributors, solicits members of the general public throughout the United States to become members of its buying service. Each member pays an annual membership fee of $12.00 per membership in the program entitling the individual members to purchase merchandise at a price considerably lower than the suggested retail price of the item. FBP membership is not limited to those individuals who purchased vacuum cleaners from the Compact defendants and in fact there are 20,000 members (Aff'dt

of M. Robert Dortch, D.A. 44). The defendant FBP is not the only company in the New York area who offered a buying service to the general public; (See, Exhibit C to aff'dt of Hyman Sindelman, D.A. 55), nor does it control a major share of that market (D.A. 51).

The defendant FBP. through its President M. Robert Dortch, submitted to the District Court uncontroverted evidence which established that at one time it sold one year memberships in its buying plan directly to the defendant A-T-O, which A-T-O in turn made available to its distributors as a *give away* in connection with the sale of A-T-O vacuum cleaners (Aff'dt of M. Robert Dortch, D.A. 46).

Further, that there came a time when A-T-O severed its relationship with FBP (Robert Limacker of A-T-O undisputed evidence fixed this date as December 3, 1968, D.A. 59). After the termination of the business relationship between A-T-O and FBP, in December of 1968, FBP sold 1 year memberships in its plan directly to the Compact defendant, for which Compact paid FBP the annual membership fee for each membership purchased (D.A. 46). There were no other business dealings between the FBP defendant and the Compact defendants, and FBP received no other financial remuneration from Compact beyond the $12 for each membership that Compact purchased (D.A. 46). The uncontroverted evidence presented to the Court below, through the affidavits of Robert Limacker of A-T-O and M. Robert Dortch of FBP, establishes beyond question that the only business dealing which A-T-O had with FBP occurred between 1967 and November 1968, during which time A-T-O purchased membership in FPB buying program directly from FBP. A-T-O sold those memberships to those of its distributors who desired to participate in A-T-O's sale promotion (D.A. 59). Further, in December of 1968, A-T-O

terminated its business relationship with FBP and notified its distributors that they were to cease using the FBP defendant's program as part of A-T-O's further sales promotion (D.A. 59, 46).

The Compact Defendants

The Compact defendants are engaged in the business of door-to-door solicitation and sales of vacuum cleaners and accessories. Said defendants purchase vacuum cleaners from A-T-O and resell them to the retail buying public (D.A. 48). The Compact defendants' customers are referred to them by other customers of theirs or potential customers and having gotten a lead, one of their sales agents visits the potential customer at his home in an attempt to sell the individual the defendant A-T-O's vacuum cleaner (D.A. 36A).

The Compact defendants sell less than one-half of one (1%) percent of the vacuum cleaners sold in the New York area (D.A. 37). The door to door solicitation of vacuum cleaner sales is an extremely competitive market in which the Compact defendants compete with such nationally known brands as Hoover, Eureka and General Electric (D.A. 37). Neither the defendant A-T-O nor the Compact defendants engage in any national advertising campaigns with respect to its vacuum cleaners. Therefore, Compact may start with a competitive disadvantage vis-a-vis those companies which sell nationally advertised brands on a door to door basis. In an effort to gain the good will of their customers and to off-set the advertising advantage of other competitors the Compact defendants, as a promotional device, gives away *free of charge* to its customers with a one-year membership in the FBP's buying program (D.A. 48, 50).

When the Compact defendants solicited any of the members of the alleged class whom plaintiff seeks to represent in this class action it did so for the purpose of selling that customer a vacuum cleaner (D.A. 36, 48). When the Compact defendants consummated a sale, it sold the vacuum cleaner to the customer with or without *a free* membership in the defendant FBP's buying program (D. A. 37). If a Compact customer is interested in taking advantage of the Compact defendants sales promotion, a one-year membership in the FBP plan is given to that customer "without charge" by the Compact defendants in an effort to gain the good-will of said customer. If there is no interest in the buying plan a customer is not given a membership. (D.A. 48)

Plaintiffs assert that the Compact defendants' vacuum cleaner salesmen, who called on the named plaintiffs and the other members of the class plaintiffs seek to represent, so extolled the advantage of belonging to the defendant FBP's buying program that many of the plaintiffs were lured, induced and even coerced to purchase the defendant A-T-O's vacuum cleaner merely to attain the *free* membership in the FBP buying program; thus, the plaintiffs' claim that they were beguiled by the silver-tongued salesmen of the Compact defendants to spend $399.95 (the price of the vacuum cleaner) to get *free* the 1 year membership in the buying service worth $12. If the plaintiffs were, as they allege, taken in by the representations made by the Compact defendants' salesmen, their proper redress is in an action in fraud, which remedy they apparently pursued; for according to the affidavit submitted by the attorney for the Compact defendant, each of the named plaintiffs, have sought to recover substantial monies from the Compact defendants in

actions maintained in the State Courts of New York[2] (Aff'dt of Norman S. Langer, A-I 13, pgs. 5-7).[3]

Summary of Argument

The defendant A-T-O manufactures vacuum cleaners which it sells to its distributors-customers located in various states throughout the United States. The Compact defendants purchased vacuum cleaners from defendant A-T-O and resold them to the retail buying public. The FBP defendants sell a membership in its family buying plan to the general public throughout the United States.

As part of its sale program, the Compact defendants gave a free one-year membership in defendant FBP's buying service to those individuals who had bought its vacuum cleaners. The one-year free membership in the defendant FBP's buying service had a value of $12.00, the cost of the vacuum cleaner which the Compact defendants sold was $399.95.

The plaintiffs erroneously contend that the giving away by the Compact defendants of a one-year membership in

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[2] According to the attorney for the Compact defendants 20 of its customers, in addition to the 5 named plaintiffs herein, also made claim in the State Court against the Compact defendants, under Section 340 of the General Business Law of the State of New York, for damages allegedly resulting from the misrepresentations made by the Compact salesmen in connection with the sale of the defendant A-T-O's vacuum cleaner. Each of these individuals was represented by John C. Gray, Jr. of Brooklyn Legal Service Corp. B., the attorney for the plaintiffs-appellants (A-I 13, p. 7).

[3] All A-1 references are references to the Index on Appeal prepared by the plaintiffs-appellants.

the defendant FBP's buying plan, in conjunction with the sale of its vacuum cleaner, constitutes an illegal tying arrangement. In order to claim an illegal tying arrangement, plaintiffs seek to establish the uniqueness of the buying plan by arguing that it was misrepresented as unique, and that the misrepresentation induced plaintiffs into the purchase of a $400 vacuum cleaner in order to obtain, without charge, a membership worth $12.

The plaintiffs failed to allege any actual coercion or use of economic muscle by the Compact defendants in connection with the sale of its vacuum cleaners to the plaintiffs, nor did they introduce any evidence that the defendants coerced the plaintiffs into buying a product they did not want. Plaintiffs' err in their claim that the misrepresentations by the Compact defendants' salesmen as to the uniqueness of the defendant FBP's buying program, constitute a *per se* violation of the anti-trust laws. The applicable authorities in this jurisdiction are to the contrary.

The plaintiffs must allege and establish the existence of actual coercion in order to maintain their action. The failure of plaintiff to allege actual coercion or to present facts sufficient to indicate that at trial plaintiff might be able to establish actual coercion, defeats the plaintiffs' claim. Therefore, the District Court's granting of summary judgment to the defendants was proper.

The plaintiffs are complaining of alleged wrongful conduct which purportedly took place between March of 1969 and December of 1972. During that period of time the defendant A-T-O had no business dealings with either the FBP or the Compact defendants, beyond the direct sale of vacuum cleaners to the Compact defendants. Therefore, the evidence below clearly demonstrates that the defendant A-T-O is not a proper party to this action, nor has it committed any acts in violation of the anti-trust laws.

POINT I

Plaintiffs have failed to allege actual coercion or establish a per se unlawful tying arrangement and therefore the Court below did not err in dismissing plaintiffs' amended complaint.

The Court below in its Memorandum and Order dated March 5, 1975 granted summary judgment to the defendants dismissing the Amended Complaint on the ground, *inter alia,* that plaintiffs had failed to allege that they were coerced into purchasing the Compact vacuum cleaner system (D.A. 5), Judge Bruchhausen relied upon this Court's decision in *Capital Temporaries Inc. of Hartford* v. *The Olsten Corp.,* 506 F. 2d 658 (2d Cir. 1974) in holding that actual coercion is a necessary element of a claim of an unlawful tying arrangement.

Plaintiffs argue on appeal that they need not allege that they were actually coerced into purchasing the Compact vacuum cleaner (the alleged tied product) but that the crucial element of coercion can be inferred from defendant FBP's supposed market power.

Plaintiffs claim that they were the victims of an unlawful tying arrangement whereby the purchase of a membership in FBP's buying service was tied to the purchase of the Compact vacuum cleaner.

Plaintiffs have alleged the existence of "market power" with respect to the sale of defendant FBP's buying plan, resulting in the alleged foreclosure of competitors from the door-to-door sales market for vacuum cleaners (Amended Complaint, ¶ 25, 26, 28, D.A. 22-23). Plaintiffs have not alleged that defendants used their supposed economic power with respect to FBP's buying service to actually coerce the plaintiffs into making a pur-

chase of a vacuum cleaner from the Compact defendants salesman. This failure to allege actual coercion is fatal to the plaintiffs' claim of a *per se* violation of Section 1 of Sherman Act.

Section 1 of the Sherman Act prohibits any contract, combination or conspiracy which unreasonably restrains trade or competition, 15 U.S.C. §1.

An arrangement whereby a seller agrees to sell a particular commodity, but only on the condition that the buyer also purchase a second separate commodity, so-called "tying arrangements", is one of a number of trade practices which, assuming certain additional criteria are met, constitute *per se* violations of the Sherman Act. *Northern Pacific R.R. Co.* v. *United States,* 356 U. S. 1 (1958). It is only when certain strictly defined elements are shown to be present that a tying arrangement is conclusively presumed to unreasonably restrain competition. *Northern Pacific RR Co.* v. *United States, supra; International Salt Co.* v. *United States,* 332 U. S. 392 (1947).

In *Capital Temporaries Inc. of Hartford* v. *The Olsten Corp., supra,* this Court held that a basic element of a *per se* unlawful tying arrangement is the coerced purchase of the tied product. In the *Capital Temporaries* case, plaintiff, a franchisee of the Olsten Corporation, maintained that as a condition of being allowed to use the Olsten name and trademark to operate a "white collar" personnel service, he was required to operate a "blue collar" service under Olsten's "Handy Andy Labor" trademark. The question on appeal was whether the plaintiff was required to establish actual coercion to operate the tied business. The Court so held. After noting that the element of actual coercion was a "basic" prerequisite before the plaintiff can become entitled to the benefit of the *per se* doctrine, the Court went on to con-

sider the ways of establishing the necessary coercion. Upon reviewing recent Supreme Court tying cases and its own prior decisions, the Court stated:

> "From this review of the cases we conclude that the plaintiff must establish that he was the unwilling purchaser of the tied product. If he was not coerced by the economic dominance of the seller, he at least must show that he was compelled to accept the tied product by virtue of the uniqueness or desirability of the tying product, which other competitors could not or would not supply." *Capital Temporaries* v. *Olsten, supra,* p. 663.

Thus, a plaintiff urging a *per se* violation of Section 1 of the Sherman Act must allege that he was the unwilling purchaser of the unwanted tied product and that he was coerced into buying the product either by virtue of the seller's "economic dominance" or by virtue of the uniqueness or desirability of the tied product. In their Amended Complaint, plaintiffs allege "market power" but fail to allege that this supposed market power was actually brought to bear to coerce the sale to plaintiffs of Compact vacuum cleaners. The District Court, therefore, correctly held that the Amended Complaint was deficient under *Capital Temporaries* v. *Olsten, supra.*

Two cases decided by the District Court for the Southern District of New York since the decision in *Capital Temporaries* v. *Olsten, supra,* as well as prior decisions of this Court, support the proposition that actual coercion is a necessary element of a *per se* cause of action. In *Margaret M. Landon* v. *Twentieth Century Fox Corp.,* 384 F. Supp. 450 (SDNY 1974), plaintiff Landon claimed that an agreement whereby Twentieth Century Fox acquired the renewal copyright to plaintiff's film as a condition of purchasing the original copyright, constituted

an illegal tying arrangement. Judge Lasker found the Complaint "fatally deficient" on the basis of *Capital Temporaries,* plaintiff having failed to allege "the exercise of actual coercion by the defendant (as distinguished from the mere presence of market power) . . ." (emphasis, the Court's). *Landon* v. *Twentieth Century Fox Corp.,* Id. at p. 457. The Court clearly read *Capital Temporaries* to require a plaintiff to prove not only the existence of economic power but that such economic power was actually brought to bear upon the buyer in order to force upon him the purchase of the tied product.

In the second Southern District case decided subsequent to the *Capital Temporaries* case, *Stan Kane Home Improvement Center* v. *Martin Paint Stores,* [1975 Trade Cases ¶ 60,379], Docket No. 70 Civ. 4438, (SDNY, June 19, 1975), the Court granted plaintiff's motion for partial summary judgment as to its price-fixing claim but denied the motion as to its claim of an illegal tie-in. Plaintiff, under a franchise of defendant Martin Paint Stores, was contractually required to purchase products from Martin. The Court found that plaintiff failed to establish that it was the ". . . unwilling purchaser of an unwanted product, i.e. that it was coerced into entering into its agreement with Martin which required it to purchase from Martin both Martin and non-Martin products, or which conditioned the purchase of some Martin products on the purchase of other, unwanted Martin products". *Stan Kane Home Improvement Center Inc.* v. *Martin Paint Stores Inc., Id.* at p. 66,646. Thus, both of the District Court cases which have applied this Court's ruling in *Capital Temporaries* have required the allegation of actual coercion in addition to the allegation of economic power.

The plaintiffs' complaint in this action is devoid of any claim that the Compact defendants, who dealt directly

with the plaintiffs, actually brought to bear upon the plaintiffs their alleged economic power in order to force upon them the purchase of the tied produce. Thus, clearly under the express language of the decisions in *Capital Temporaries* v. *Olsten, supra; Landon* v. *Twentieth Century Fox Corp., supra;* and *Stan Kane Home Improvement Center* v. *Martin Paint Stores, supra,* Judge Bruchhausen's action in dismissing the plaintiffs' claim was proper and should be affirmed by this Court.

Capital Temporaries v. *Olsten, supra,* did not effect any substantive change in the law when it stated the requirement of actual coercion; it merely underscored a requirement that was always implicit in the law. In *American Manufacturers Mutual Insurance Co.* v. *ABC-Paramount Theaters,* 446 F. 2d 1131 (2d Cir. 1971), cert. denied 404 U. S. 1063 (1972), this Court stated that "there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice". In *American Manufacturers,* plaintiffs claimed that they were forced to purchase advertising time on certain undesirable television stations owned by defendants as a condition of being allowed to purchase time on other more desirable stations. In rejecting plaintiffs' claim that defendants action foreclosed competition, the Court held:

> ". . . Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie."

The Courts have often recognized that whatever economic muscle a seller possesses must be affirmatively exercised. Proof of economic muscle alone offers no foundation to permit the inference that the muscle was actually used to coerce the buyer. In *Coniglio* v. *Highwood Services, Inc.,* 495 F. 2d 1286 (2d Cir. 1974) Chief Judge

Kaufman isolated as one of the essential elements necessary to constitute an illegal tying arrangement the existence of "sufficient economic power in the tying market to coerce purchase of the tied product". *Coniglio* v. *Highwood Services, Inc., Id.* at p. 1289.

The plaintiffs offered the Court below no evidence to support any claim whatsoever that the defendants used any economic muscle to coerce the plaintiffs into spending $399 for a vacuum cleaner manufactured by the defendant A-T-O in order to obtain, free of charge, a one year membership in a buying service plan offered by the FBP defendants worth $12. The essence of plaintiffs' claim as to the issue of coercion is that the smooth talking silver tongued salesmen employed by the Compact defendants did beguile them and they did buy.[4] Neither such allegations nor the proof of such misrepresentations can in any way sustain the plaintiffs' burden of establishing the use of "economic muscle" by the defendants. Therefore, plaintiffs' case was properly dismissed by the District Court.

The plaintiffs attempted to circumvent the requirement that they establish actual coercion by the defendants, by the claiming that the defendants engaged in a tying arrangement which constituted a *per se* violation of the

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[4] In the original affidavits submitted by the plaintiffs (aff'dts of plaintiffs Hill, Lindo, Raphael, Rutherford and Lewis, A-I 64) in opposition to the defendants' motion for summary judgment, the plaintiffs acknowledged that the Compact salesmen came to their homes to sell them a vacuum cleaner, and claimed that they bought the vacuum cleaner because of the misrepresentations of these door-to-door salesmen. In the subsequent affidavit submitted by the plaintiffs, (A-I 84, 86) the plaintiffs, for the first time claimed that not only were they cajoled and induced, but that they were also "coerced". The District Court properly rejected the plaintiffs' attempt to support their claim by merely interjecting the required legal allegations. Calling a "dandelion" a "daisy" does not make it a "daisy".

Sherman Anti-trust Act. The essence of this *per se* approach to a tying arrangement is the presumption that competition has been unreasonably restrained in the market for the tied product.[5] This is the ultimate conclusion of law which is triggered by the establishing of "market dominance" or certain prima facie facts of the tying product's "uniqueness", *United States* v. *Loew's Incorporated,* 371 U. S. 38 (1962). "Market dominance means the power to control prices and exclude competition". *United States* v. *Loew's Incorporated, Id* at p. 45. Otherwise referred to as "market power", it is "the ability of a single seller to raise prices and restrict output", *Fortner Enterprises Inc.* v. *United States Steel Corp.,* 394 U. S. 495, 503 (1969). Absent a showing of market power or dominance, the requisite economic power "may be inferred" from the tying product's desirability or uniqueness. *Fortner Enterprises, Inc.* v. *United States Steel Corp., Id* at 503; *United States* v. *Leow's Incorporated, supra; Coniglio* v. *Highwood Services, Inc., supra.*

The plaintiffs have cited *Fortner Enterprises,* in support of their position that the defendants' action constitutes a violation of the anti-trust laws. In *Fortner,* in order to obtain credit for construction, the plaintiffs were required to buy particular prefabricated houses. It is totally unreasonable to equate the instant case with the situation in *Fortner Enterprises.* It is absurd to suggest that the defendant FBP's buying plan, which could be purchased for $12, was so desirable or unique that it gave the defendant sufficient economic power to compel the purchase of a $399 vacuum cleaner. For, using the same logic applied by the plaintiffs, it may be argued that the

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[5] The plaintiffs offered no evidence to suggest that the conduct of the defendants resulted in a lessening of competition in the "door-to-door vacuum cleaner sales" market. Contra, See Exhibits D & F to aff'dt of Robert W. Limacher, D.A. 70, 71, 72.

manufacturers of "Crackerjacks" forced the sale of their produce upon unwilling consumers by offering "free" the token toy contained in the package. The tail does not wag the dog, and the desirability of a gift valued at $12 does not create monopolistic power to compel the purchase of an unwanted or unneeded $399 vacuum cleaner.

Plaintiffs allege, upon information and belief, that defendants possess "market power" with respect to the sale of family buying services (Amended Complaint, ¶11; D.A. 22). The supposed market power allegedly stems from one or more of the following factors: a) the "uniqueness" of the defendant FBP family buying plan; b) the "representations of its uniqueness" made by the Compact defendants salesmen; c) "the unique terms" of the plan, i.e. the fact that it is given away "free"; and/or d) the advantages which FBP may enjoy over its competition (D.A. 22-23). Plaintiffs also allege that the existence of such market power may be inferred from the large number of tie-in sales made by the Compact defendant and the allegedly "artificially inflated price" at which the Compact defendants sold its vacuum to the plaintiffs, (D.A. 23). It is obvious from these allegations that plaintiffs rest their claim of economic power, not upon any facts which establish actual market power, but rather upon an inference of economic power. Such inference is grounded on either the supposed uniqueness or desirability of the defendant FBP's plan or upon the quantity of "tie-ins" imposed and the "inflated" selling price of the Compact vacuum.

Economic power may be inferred from the tying product's uniqueness or desirability to customers. *Coniglio* v. *Highwood Services, Inc., supra.* Although plaintiffs allege that the defendant FBP's buying plan is unique, they also allege and presumably intended to prove, that Compact defendants' saleman's representations of the

plan's uniqueness are untrue and that they were the victims of "fraud and misrepresentation". Plaintiffs are attempting to take both sides of the issue. Either the defendant FBP's buying plan is unique or it is not. If the Compact defendants' salesman's representations of uniqueness were lies, i.e. if the plan is not unique, then plaintiffs may have a claim sounding in fraud but they certainly have no anti-trust violation. (The plaintiffs in the present case, together with other persons have pursued their claim of fraud in other actions maintained against the Compact defendants in the Courts of the State of New York (See footnote 2 on page 10 *supra*). The plaintiffs cannot rely on their allegations of fraudulent misrepresentations by the Compact defendants' salesman of uniqueness of the defendant FBP's buying plan to bootstrap themselves into the element of economic power.

Failing to establish the existence of or use of market power the plaintiffs seek to attain their ultimate goal of proving a restraint of trade by implying a coerced purchase; they infer a coerced purchase from economic power; economic power from uniqueness; and uniqueness from allegations of misrepresentation and inflated prices and the very sale of the vacuum cleaners by the Compact defendants. Thus, *reductio ad absurdum*, the only facts plaintiffs contend they need allege are the existence of separate products and some allegation of uniqueness.

In the alternative, plaintiffs argue that even if actual coercion is required, they have alleged the necessary facts (Appellants' Brief, Point IB). However, it is clear from plaintiffs' allegations that any claim of actual coercion is not predicated upon any use of economic dominance or the actual uniqueness of the tying product, but a claim of fraudulent misrepresentations by the Compact defendants' salesman as to the uniqueness of the defendant FBP's buying plan. The Court's opinion *Capital Tem-*

poraries v. *Olsten, supra,* is quite specific in requiring that the coercion must flow from the seller's economic dominance in the market or the uniqueness of the tying product. Neither dominance nor uniqueness have been established Therefore, the District Courts' dismissal of plaintiffs' action and its granting of summary judgment to the defendants should be affirmed.

POINT II

Plaintiffs have not alleged any facts to establish a cause against the defendant A-T-O.

From the record presented to it, the Court below was justified in granting the defendant A-T-O's summary judgment. The uncontroverted evidence established that on or about December 3, 1968, the defendant A-T-O terminated its business relationship with the defendant FBP (D.A. 59, 66). Further, that subsequent to December 3, 1968, A-T-O's business relationship with the Compact defendants was merely that of the manufacturer of vacuum cleaners selling its vacuum cleaners to one of its many distributor-customers (D.A. 59).

The plaintiffs are seeking redress for alleged wrongful conduct which they claim occurred between March 20, 1969 and December 3, 1973 (Plfs. Brief, p. 7). During said period, the unchallenged evidence establishes that the defendant A-T-O had no business relationship or dealings with the defendant FBP and A-T-O's only relationship with the Compact defendants was the fact that it sold Compact vacuum cleaners. The defendant A-T-O cannot properly be charged with any conduct constituting a restraint of trade based upon the activities of either the FBP defendants or the Compact defendants' absent any meaningful business relationship between such par-

ties and A-T-O. Therefore, the granting of summary judgment to the defendant A-T-O was in all respects proper and should be affirmed. Rule 56, F. R. Civ. Pro.

POINT III

The plaintiffs cannot properly maintain this action as a class action under Rule 23.

If this Court should conclude that the District Court erred in granting the defendants summary judgment, it should review the propriety of the lower court's Rule 23 class action certification. Upon such consideration, this Court should set aside the Rule 23 certification. For, the District Court's finding, inherent in said certification that there are common questions of fact which predominate in this litigation was erroneous.

The certified class contains approximately 10,000 plaintiffs, all of whom are customers of the Compact defendants. During the four and one-half year period between March 1969 and December 1973, these 10,000 customers of the Compact defendants were contracted and solicited by over 800 of Compacts' salesmen. In selling the plaintiffs vacuum cleaners, each of 800 salesmen make their own individual sales presentation to the potential customers (the plaintiffs). In this action, the plaintiffs assert that the Compact defendant salesmen made misrepresentations of facts as to the uniqueness, value and utility of the membership of the defendant FBP's buying program, and further, that said salesmen, through their oral presentation, "induced", "cajoled" and "coerced" the plaintiffs into buying the defendant A-T-O's vacuum cleaner in order to obtain a free membership in FBP's buying program.

Certainly 800 salesmen visiting over 10,000 plaintiffs in a four and one-half year period cannot be said to have made the same oral representations to each of the 10,000 plaintiffs and plaintiffs submitted no evidence to the Court below to establish that they were. Therefore, this action by plaintiffs, the gravamen of which is allegation of an oral fraudulent misrepresentation resulting in an illegal tying arrangement, cannot properly be maintained as a class action. *Ingenito* v. *Bermec Corporation,* 376 F. Supp. 1154, 1166 (S. D. N. Y. 1974); *Morris* v. *Burchard,* 51 F. R. D. 130, 134-35 (S. D. N. Y. 1971); *Moscarelli* v. *Stamm,* 288 F. Supp. 453, 462 (E. D. N. Y. 1968); *Speros* v. *Nelson* [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. Paras. 93,791 at 93,427 (D. Ore. 1973); *Goldstein* v. *Regal Crest,* CCH Fed. Sec. L. Rep. §93,985 (E. D. Pa., 1973); *Pearson* v. *Ecological Science Corp.,* CCH Fed. Sec. L. Rep. §93,985 (S. D. Fla., 1973); *Blakely* v. *Lisac* [1972-1973 Transfer Binder] (CH Fed. Sec. L. Rep. Para. 93,778, at 93,417 (D. Ore. 1972).

The Court below dismissed this action on the basis that the plaintiffs had failed to allege or present a scintilla of evidence to demonstrate the existence of "actual coercion" in this case. The existence of "market dominance" and "coercion" which are both essential elements of proof in plaintiffs' claim of the existence of an illegal tying arrangement, are questions of fact. Such questions of fact, particularly as to the presence of coercion, must by their very nature vary from sale to sale. In the instant case, where there were approximately 800 salesmen visiting over 10,000 plaintiffs, there must be substantial variations of the fact alleged to constitute "coercion", and such variations are sufficient to defeat an application for a class of certification under Rule 23 (b) (2) F. R. Civ. Pro.; *Abercrombie* v. *Lums, Inc.,* 345 F. Supp. 387 (S. D. Fla., 1972); *Lah* v. *Shell Oil Co.,* 50 F. R. D.

198 (S. O. Ohio, 1970); *Hettinger* v .*Glass Specialty Co. Inc.*, 59 F. R. D. 286 (N. D. Ill. 1973). Thus, even if this Court should conclude that the Court below erred in dismissing this action upon a finding that there was an absence of "actual coercion", the lower court's finding that there was no allegation or evidence to estal lish "actual coercion" is in itself sufficient to defeat plaintiffs' right to a class action certification under Rule 23 and said certification should be vacated and set aside.

CONCLUSION

The plaintiffs failed to allege that they were actually coerced by the Compact defendants to purchase a product that they did not want. Further, the evidence demonstrates that plaintiffs could not substantiate such an allegation even if made.

Moreover, the alleged tying product, to wit: a one year membership in the defendant's FP s buying plan, which had a value of $12, was given away free to the customers of the Compact defendants who bought vacuum cleaners at a cost of $399. The FBP buying plan was not unique, nor was the economic power of the defendants sufficient to create a *prima facie per se* violation.

Further, it is apparent from the uncontradicted evidence that during the relevant period the defendant A-T-O had no meaningful business relationship with the FBP defendants or the Compact defendants. Therefore plaintiffs cannot sustain any inference that A-T-O had engaged in conduct in violation of the Sherman Anti-Trust Act.

The order and judgment appealed from should, in all respects be affirmed.

Respectfully submitted,

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Memorandum and Order of Bruchhausen, D. J., dated March 5, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHERYL PERRY HILL, *et al.*,

Plaintiffs,

—against—

A-T-O, INC., *et al.*,

Defendants.

No. 73 C 1779

March 5, 1975

MEMORANDUM AND ORDER

BRUCHHAUSEN, D. J.

The defendants move for an order granting leave to re-argue the motion for summary judgment submitted on January 8, 1975, which was denied by the order of this Court on January 21, 1975.

The Court has considered the application, and upon the authority contained in Capital Temporaries Inc. of Hartford v. The Olsten Corporation, 506 F.2d 658 (1974) (Cir. 2), must grant leave to reargue.

Briefly stated, this action was commenced pursuant to 15 U.S.C. 15, 26, and 28 U.S.C. 1337. It is a class action

alleging liability of two violations of the Sherman Act, 15 U.S.C. 1 and 2. It is alleged that the defendants have conspired among themselves to use and impose an illegal tie-in scheme upon the public, and secondly, to have conspired among themselves to use a selling program based on fraud, all in violation of free competition in interstate commerce. A.T.O, Inc., is the manufacturer of the article, a cannister type vacuum cleaner for residential home use. A-T-O, Inc., pursuant to a franchise agreement with the Compact defendants, dated April 1, 1971, were given permission to sell the product within the New York City area. The Family Buying Power defendants then contracted with the Compact defendants to sell and distribute its buying power membership in the territory, 225 mile radius of Bellerose, New York. The plaintiffs allege that the sales presentations used contain gross misrepresentations and fraudulent statements.

The amended complaint alleges the existence of illegal tie-in arrangements which have been imposed by the defendants, market power over the tying product, foreclosure of competitors, a substantial impact upon inte state commerce, and finally damages as a result of the alleged violation of the Act.

In Capital Temporaries Inc. of Hartford v. The Olsten Corporation, 506 F. 2d 658 (Cir. 2), decided October 17, 1974, the Court held in part at page 662:

> "We do not think that there can be any question that no tying arrangement can possibly exist unless the person aggrieved can establish that he has been required to purchase something which he does not want to take."

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The Court then proceeded to discuss the leading cases on the subject and concluded in part at page 663:

> "From this review of the cases we conclude that the plaintiff must establish that he was the unwilling purchaser of the tied product. If he was not coerced by the economic dominance of the seller, he at least must show that he was compelled to accept the tied product by virtue of the uniqueness or desirability of the tying product, which other competitors could not or would not supply."

In Margaret M. Landon v. Twentieth Century-Fox Film Corporation, 384 F. Supp. 450 (S.D.N.Y.) decided November 13, 1974, the complaint alleged an illegal tying arrangement in violation of the Sherman Act, 15 U.S.C. 1. The Court in dismissing the complaint held in part at page 457:

> "* * * As the Second Circuit has recently stated, the exercise of actual coercion by the defendant (as distinguished from the mere presence of market power) is a necessary element of an unlawful tying arrangement. See Capital Temporaries, Inc. of Hartford v. The Olsten Corporation, —— F. 2d —— (2d Cir. 1974) and cases cited there; * * *"

In the case at bar, neither the complaint nor any supporting affidavit suggests the above essentials to sustain the first cause of action. It appears that the contrary is present, namely, the affidavits of the plaintiffs, Hill, Rutherford, Lewis, Raphael, and Lindo allege absolutely no coercion by the salesman who sold them the item.

Furthermore, plaintiffs' statement pursuant to General Rule 9(g) makes no assertion of the existence of actual coercion.

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The Court, therefore, guided by the rules as stated in the above cases concerning tying arrangements, must dismiss the first cause of action since it has failed to establish actual coercion on behalf of the defendants.

The second cause of action alleges fraudulent business practices in violation of the Sherman Act. The Anti-Trust Act was never meant to be utilized or extended to include claims for common law fraud and deceit. See Norville v. Globe Oil and Refining Co., 303 F.2d 281 and cases cited therein.

The motion to reargue is granted and upon reconsideration the motion of the defendants for summary judgment dismissing the complaint is granted.

It is so ordered.

Copies hereof are being forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U. S. D. J.

Memorandum and Order of Bruchhausen, D. J., dated January 21, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

BRUCHHAUSEN, D. J.

The facts in this case were briefly summarized in an opinion of this Court, dated and filed on June 19, 1974. It would serve no useful purpose to repeat them in this memorandum.

This Court is again flooded with several notices of motions and cross motions, together with voluminous affidavits, exhibits and memoranda in support and in opposition to their respective positions.

The Court will not reiterate the specific position of each movant, excepting to state that the voluminous data has been reviewed and the Court rules as follows:

Firstly, the motion of the defendants to strike the jury demand of the plaintiffs is denied. See Moore's Federal Practice, Second Edition, Vol. 5, pages 314-322, and the cases cited therein.

Secondly, the motion of the defendants for summary judgment dismissing the amended complaint is denied.

The disputed factual issues, submitted, cannot be resolved by motion. They raise real and genuine issues of fact to be resolved at trial. It is well settled that a

Memorandum and Order of Bruchhausen, D. J., dated January 21, 1975

Court may not and cannot resolve disputed issues of fact. It can only rule whether or not any such issues exist for determination.

Thirdly, the motion of the Compact defendants for a stay of all proceedings in this action is denied.

The plaintiffs here seek relief for alleged injuries, sustained as a result of violations of the federal anti-trust laws. The state court actions are apparently for monies due and owing on goods sold and delivered to the plaintiffs by the defendants. A determination of the issues in those actions may resolve some of the issues, pending in this suit. However, that reason alone is not sufficient to stay proceedings in this Court.

Fourthly, the plaintiffs' motion to dismiss counterclaims 66 and 67 interposed in the answer of the Compact defendants is granted.

This counterclaim seeks judgment or set-offs against some class members presently in default, some class members with judgments entered against them, and some class members who may become in default. This counterclaim seeks judgment, if any, against class members against those who apparently are not party plaintiffs to this action. In Donson Stores, Inc. v. American Bakeries Company, 58 F.R.D. 485 (1973)(S.D.N.Y.), the Court held in an anti-trust case that counterclaims, if any, can only be asserted against parties to the litigation. See cases cited therein.

Fifthly, the plaintiffs move for an order declaring that this action proceed as a class on behalf of a sub-class against the named defendants during the period from March 20, 1969 to December 3, 1973, pursuant to Rules

Memorandum and Order of Bruchhausen, D. J., dated January 21, 1975

23(b)(3) and 23(c)(4)(B) of the Federal Rules of Civil Procedure.

The complaint defines the sub-class that consists of all persons who purchased or received a buying service, operated by the Family Buying Power, Inc., defendants together with a vacuum cleaner manufactured by ATO from the Compact defendants during the above mentioned period.

The Court must initially find that all the prerequisites for a class action are present, as set forth in Rule 23(a) of the Federal Rules, namely, (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to satisfying the requirements of 23(a), it must be shown that one of the prerequisites of 23(b) is present. The plaintiffs are proceeding pursuant to subsection (3):

> "The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The Court finds it unnecessary to consider each prerequisite above, as applicable to the facts at bar, except to conclude after considering the positions of the parties together with the applicable law, a class action here is appropriate.

Memorandum and Order of Bruchhausen, D. J., dated January 21, 1975

Finally, the plaintiffs are required pursuant to Rule 23(c)(2) to effectuate individual notice to the class at plaintiffs' sole cost and expense. Eisen v. Carlisle & Jacquelin, decided May 28, 1974. This individual notice is mandatory and unambiguous, a requirement of Rule 23.

A pre-trial conference is scheduled for April 30, 1975, at 10 A.M. before this Court.

It is so ordered.

Copies hereof are being forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U.S.D.J.

Memorandum and Order of Bruchhausen, D.J., dated June 19, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances

JOHN C. GRAY, JR., ESQ.
Attorney for Plaintiffs

HARRIS & FREDERICKS, ESQS.
Attorneys for Defendant A-T-O Inc.

DIFALCO, FIELD & O'ROURKE, ESQS.
Attorneys for Defendants
Family Buying Power, Inc.
Nationwide Promotions, Inc.
Executive Cleaning Power, Inc.
Family Cleaning Power, Inc.
M. Robert Dortch and Frank Dortch

NORMAN S. LANGER, ESQ.
Attorney for Defendants
Compact Associates, Inc.
Compact Bellerose, Inc.
Compact Electra Corp. and
Hyman Sindelman, a/k/a
Hy Delman

BRUCHHAUSEN, D. J.

The defendants, Family Buying Power, Inc., Nationwide Promotions, Inc., Executive Buying Power, Inc.,

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Family Cleaning Power, Inc., M. Robert Dortch and Frank Dortch move for an order pursuant to 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint for failure to state a claim upon which relief may be granted, or in the alternative pursuant to Rule 12(e) to file a more definite statement, and pursuant to Rule 12(f) for an order striking paragraphs 21-25 from the complaint.

The defendants, Compact Associates, Inc., Compact Bellerose, Inc., Compact Electra Corp., and Hyman Sindelman cross move for the identical relief together with and upon the ground that the claims are time barred pursuant to 15 U.S.C. 15(b).

The defendant A-T-O, Inc., joins in support of the motion of the co-defendants, for an order dismissing the complaint pursuant to Rule 12(b)(6) on the grounds that the complaint fails to state any claim upon which relief may be granted and pursuant to Rule 12(f) for an order striking paragraphs 21-25 from the complaint.

At the outset, subsequent to the motions seeking an order striking paragraphs 21-25 of the complaint, an amended complaint was served and filed without these allegations, therefore, that part of the motion is now academic and need not be considered.

This action was commenced pursuant to 15 U.S.C. 15, 26, and 28 U.S.C. 1337. It is a class action alleging liability of two violations of the Sherman Act, 15 U.S.C. 1 and 2. It is alleged that the defendants have conspired among themselves to use and impose an illegal tie-in scheme upon the public, and secondly, to have conspired among themselves to use a selling program based on fraud, all in violation of free competition in interstate commerce. A-T-O, Inc., is the manufacturer of the article,

Memorandum and Order of Bruchhausen, D.J., dated June 19, 1974

a cannister type vacuum cleaner for residential home use. A-T-O, Inc., pursuant to a franchise agreement with the Compact defendants, dated April 1, 1971, (pltf's Exh. A), were given permission to sell the product within the New York City area. The Family Buying Power defendants then contracted with the Compact defendants to sell and distribute its buying power membership in the territory, 225 mile radius of Bellerose, New York (pltf's Exh. B). The plaintiffs allege that the sales presentations used contain gross misrepresentations and fraudulent statements, (pltf's Exhs. D, E, F).

The defendant A-T-O, Inc., has interposed and filed its answer to the original complaint, January 28, 1974. In its answer, it has interposed general denials to the major allegations and thereafter on February 11, 1974, propounded 12 separate interrogatories with subsections thereto to the plaintiffs. The remaining defendants have filed their respective notices of appearances and to date have not answered the complaint or the amended complaint.

The amended complaint alleges the existence of an illegal tie-in and arrangement which have been imposed by the defendants, market power over the tying product, foreclosure of competitors, a substantial impact upon interstate commerce and finally damage as a result of the alleged violations of the Act.

It is well settled that a pleading should not be dismissed summarily unless it is clear that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41.

In Fortner Enterprises, Inc. v. United States Steel Corp., et al., 394 U.S. 495, the district court dismissed the complaint on the basis of its complaint, affidavits, pre-

trial discovery that were filed during the pre-trial proceedings. The Court of Appeals affirmed and the United States Supreme Court reversed, holding that the district court incorrectly assumed that the standards in Northern Pacific Railway Company v. United States, 356 U.S. 1, for determining the illegality per se of a tying agreement had to be met before petitioner could prevail on the merits.

The facts raised by the petitioner, if proved during trial, make the per se doctrine applicable to the tying arrangement.

The volume of commerce allegedly foreclosed was substantial when measured not by the portion of the total accounted for by petitioner's contracts, but by the total volume of sales tied by respondents' challenged sales policy.

Economic power may be inferred from the seller's ability to raise prices, or impose other burdensome terms such as a tie-in with respect to any applicable number of buyers within the market and does not require a showing of the seller's dominance over the market for the tying product.

In Fortner Enterprises, Inc. v. United States Steel Corp., supra, the Court discussed fully the conditions and prerequisites of alleged illegal tying arrangements and reaffirmed the standards in Northern Pacific Railway Company v. United States, 356 U.S. 1, in which the Court held in part, at pages 5-6:

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal

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without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. * * *

"Where [tying] conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. International Salt Co. v. United States, 332 U.S. 392."

Despite its recognition of this strict standard, the District Court held that petitioner had not even made out a case for the jury.

The Court held further in part at page 500:

"* * * And such an examination could rarely justify summary judgment with respect to a claim of

this kind, for as we said in Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962):

> 'We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

The Court has considered the voluminous affidavits, memoranda together with the exhibits, and pursuant to the established law must deny the motions to dismiss the complaint. The plaintiff is clearly entitled to its day in court and to be afforded an opportunity to prove his case. Fortner Enterprises, Inc. v. United States Steel Corp., supra.

The alternative relief to file a more definite statement is also unwarranted, and that relief is denied. The parties may avail themselves of the liberal discovery rules of the Federal Rules of Civil Procedure.

Finally, the motion to dismiss on the ground that the claims are time barred is also denied. See Luria Steel & Trading Corporation v. Ogden Corporation, 484 F.2d 1016 (1973) (Cir. 3). In Re Antibiotic Antitrust Actions, 333 F. Supp. 317 (1971) (S.D.N.Y.).

The attorneys for the parties are requested to attend at Part 3 of this Court on October 10, 1974, at 10 A.M. for a conference, including the fixation of a trial date.

Memorandum and Order of Bruchhausen, D.J., dated June 19, 1974

It is so ordered.

Copies hereof are being forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U. S. D. J.

Amended Complaint

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

I

PRELIMINARY STATEMENT

1. This is an action for injunctive relief and treble damages, brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The action is based upon certain contracts, combinations, and conspiracies entered into among the several defendants and others unreasonably to restrain trade and commerce in home vacuum cleaners among the several states, the effect of which has been and continues to be unreasonably to restrain said trade, and commerce, all to the injury of the plaintiffs and the class they represent.

II

JURISDICTION

2. Jurisdiction is based upon 15 U.S.C. §§15 and 26, and 28 U.S.C. §1337.

III

PARTIES

A. INDIVIDUAL PLAINTIFFS

3. Plaintiffs Cheryl Perry Hill, Thelma Lindo, Victoria Raphael, Lurline Rutherford, and Ansonia Lewis, are all

persons who reside in New York City, New York and who have entered into agreements with defendant Compact Electra Corp., for the purchase of vacuum cleaners with accessories and for membership in defendant Family Buying Power, Inc.

B. Plaintiffs' Class

4. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated, pursuant to Rules 23(b)(1), (2) and (3) of the Federal Rules of Civil Procedure.

5. Plaintiffs' class is composed of all persons who have entered or may in the future enter into agreements with defendants A-T-O, Inc. and Interstate Engineering and Family Buying Power, Inc. or distributors and agents thereof for the purchase of vacuum cleaners with accessories and for membership in Family Buying Power, Inc. Plaintiffs' claims are typical of those of the class. The members of the class are too numerous to join individually in this action and appear before the Court. The named plaintiffs will fairly and adequately protect the interests of the class.

6. Defendants have acted and refused to act on grounds generally applicable to the class and will so continue in the future, thereby making appropriate injunctive relief with respect to the class as a whole. Prosecution of separate actions by the individual members of the class would create a risk of inconsistent or varying adjudications with respect to the individual members of the class which would establish incompatible standards of conduct for the defendants. Furthermore, the questions of law and fact common to the members of the class predominate over

any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

7. The questions of law and fact common to the class are whether the defendants entered into certain contracts, combinations and conspiracies unreasonably to restrain the interstate trade and commerce in home vacuum cleaners, the effect of which has been unreasonably to restrain said trade and commerce, thereby injuring the members of the class due to both the resulting foreclosure of competing home vacuum cleaner sellers and the resulting monopoly control and power over prices and quality of said merchandise.

C. DEFENDANTS

8. A-T-O, Inc. is a domestic corporation, duly organized and existing under and by virtue of the laws of the State of Ohio. Its principal place of business is Willoughby, Ohio. Interstate Engineering (hereinafter referred to as "Interstate") has its principal place of business in Anaheim, California and is a division of A-T-O, Inc., and manufactures the "Compact" vacuum cleaner system (hereinafter referred to as "the vacuum cleaner"). Prior to 1968, Interstate was an independent corporation.

9. Family Buying Power, Inc. (hereinafter referred to as "FBP") is a domestic corporation, organized and existing under the laws of the state of New York. It may also be organized under the same name as a domestic corporation in the State of New Jersey. Nationwide Promotions, Inc. is a domestic corporation, organized and existing under the laws of the State of New York, and, on information and belief, was a predecessor to FBP

and may continue in the same business. (Both FBP and Nationwide Promotions, Inc. are sometimes hereafter referred to as the "membership promotion companies"). The principal place of business of each corporation is U.S. Highway 180 at Route 35, Cranbury, New Jersey.

10. Executive Buying Power, Inc. and Family Cleaning Power, Inc., are domestic corporations organized and existing under the laws of the state of New York. They are related to the membership promotion companies, with their principal places of business at the same address. (Both Executive Buying Corporation and Family Cleaning Power Inc. are sometimes hereinafter referred to as the "promotional purchasing companies").

11. M. Robert Dortch and Frank Dortch (hereinafter referred to as the "Dortches") are respectively the President and Vice President of and the chief stockholders in, each of the membership promotion companies and the promotional purchasing companies. On information and belief, both are residents of the State of New Jersey and have their principal place of business at the above common address for the companies they own and operate.

12. Compact Associates, Inc., Compact Bellerose, Inc. and Compact Electra Corp. are domestic corporations organized and existing under the laws of the State of New York. Their principal place of business is at 246-14 Jamaica Avenue, Bellerose, New York.

13. Hyman Sindelman, also known as Hy Delman, (hereinafter "Sindelman") is the sole owner and President of Compact Associates, Inc., Compact Bellerose, Inc. and Compact Electra Corp., and several related corporations. He resides at 2770 Ocean Avenue, Brooklyn, New

York. (Sindelman and Compact Associates, Inc. or Compact Bellerose, Inc. and the corporations allied thereto are sometimes hereafter referred to as the New York Compact distributors").

IV

Statement of Facts

14. Plaintiffs and the members of their class had no knowledge of the contracts, combinations, and conspiracies hereinafter set forth until the initiation of extensive discovery by their attorneys in connection with certain lawsuits begun by Compact Electra Corp. Plaintiffs could not have discovered the facts indicating the existence of the alleged offenses at an earlier date because of the deceptive practices and techniques of secrecy employed by defendants to avoid detection and to fraudulently conceal such combination and conspiracy.

15. On information and belief, Interstate manufactures the vacuum cleaner in Anaheim, California and sells it exclusively through a system of territorial distributorships throughout the United States and Canada.

16. Said vacuum cleaner is a canister-type device designed for residential home use, sold as a "Compact System" with several attachments including a waxer-polisher, sprayer and "demother", and a hairdryer which are manufactured by Interstate and are designed for use with the basic machine.

17. FBP holds itself out to be an organization to benefit its "members" which issues certificates of membership, and whose "members" can receive quotations on and purchase goods through it at allegedly favorable prices.

18. In truth, FBP is a private corporation organized for profit, offering only to act as a quotation and buying agent for its "members". On information and belief, FBP sells its "memberships" exclusively through a system of territorial franchises throughout the United States, primarily as a sales promotion or "baiting" gimmick, for the actual benefit of itself and its franchisees. Any consumer goods sold to FBP members are actually purchased and delivered by the promotional purchasing companies.

19. On information and belief, Compact Associates, Inc., and Compact Bellerose, Inc., either alone or with their sole owner and President, Hyman Sindelman, hold and have held exclusive territorial franchises that overlap geographically from both Interstate and FBP to distribute and sell the vacuum cleaner and membership in FBP in the New York City area.

20. On information and belief, pursuant to understandings and agreements entered into among Interstate, FPB, the Dortches, Compact Associates, Inc., Compact Bellerose, Inc., Compact Electra Corp., and Hyman Sindelman, sales of the vacuum cleaner and membership in FBP in New York City, New York are made exclusively by in-home salesman-employees of Compact Electra Corp.

21. On information and belief, pursuant to the aforesaid agreements and understandings Compact Electra Corp. causes its salesmen-employees to concentrate their efforts on lower-income persons who are relatively unsophisticated in consumer transactions of the type and magnitude involved herein and who are unable, within the context of the sales presentation, to evaluate the value and utility of the combination of the vacuum cleaner and membership in FBP.

Amended Complaint

THE TIE-IN ARRANGEMENTS

22. On information and belief, on or about September 1967, Interstate entered into an agreement or agreements with FBP wherein FBP would franchise or license Interstate or Interstate's distributors, including the New York Compact Distributors, with exclusive territorial licenses or franchises, geographically overlapping Interstate's distributorship territories, to be used to sell membership in FBP ("the buying plan") and wherein Interstate would require its distributors to accept and use said FBP franchises and its buying plan in promoting vacuum sales as an express or implied condition of obtaining or continuing their Interstate franchises.

23. On information and belief, pursuant to the aforesaid agreement or agreements between FBP and Interstate, and other agreements and understandings among the defendants, FBP gave the New York Compact distributors the exclusive area franchise to market its buying plan in the New York City area, with the knowledge and intent on the part of all parties that the sales of the vacuum cleaner be in fact tied to the sale of the buying plan, and that the sale of the buying plan be misrepresented as "free" or given "without charge" to customers who agree to buy the vacuum cleaners.

24. Pursuant to the agreements, combinations and conspiracies among the defendants, the buying plan may not be sold as a separate item. The only way one can purchase the buying plan is by purchasing the vacuum cleaner.

25. Upon information and belief, the defendants exercise market power in the market for the buying plan. This

market power results from one or more of the following factors: a) the uniqueness of the plan itself, b) the representations of its uniqueness made by Compact's salesmen, c) the unique terms on which the plan is offered to plaintiffs and members of their class—namely, the fact that it held out as "free" and/or d) the advantages which FBP enjoys over its competition, if any, in the market for such buying plans. The existence of such market power may be inferred from the fact that the New York Compact distributors have been successful in imposing the tie-in between the plan and the cleaner in many thousands of cases, resulting in numerous sales of the vacuum cleaner to persons who otherwise would have purchased only the plan if informed of its $12.50 price and allowed to purchase it separately, and by the artificially inflated price at which the many sales of the tied product—the vacuum cleaner—have been made.

26. Upon information and belief, competitors have been foreclosed from the relevant market, which is the door-to-door sales market for vacuum cleaners, as a result of the tie-in sales herein complained of.

27. Plaintiffs have been damaged by the tie-in in that they have been forced to pay artificially inflated prices for inferior goods which they would not have purchased had not the tie-in been imposed.

28. A "not insubstantial" amount of interstate commerce is involved. Upon information and belief, the New York Compact distributors alone sell more than 2,000 vacuum cleaners and memberships per year via the tie-in arrangement. The total dollar volume of interstate commerce involved is thus, in the New York City area alone, in excess of $800,000.00 each year. The national volume

of Interstate's vacuum cleaner sales is no doubt in excess of $1,000,000.00 per year.

29. The above-stated tie-in arrangement is an unreasonable restraint *per se* and is unreasonable in fact under Section 1 of the Sherman Act, 15 U.S.C. §1.

CONSUMER EXPLOITATION

30. The New York Compact distributors train and instruct the salesmen-employees of Compact Electra Corp. in in-home sales techniques. On information and belief, material and methods for this training are produced and supplied by Interstate and FBP and are used by Compact Associates, Inc., Compact Bellerose, Inc., Compact Electra Corp., and Hyman Sindelman pursuant to agreements or understandings entered into among these defendants.

31. On information and belief, as a part of the aforesaid training and instruction and pursuant to agreements and understandings among the defendants, the salesmen-employees of Compact Electra Corp. or the New York Compact distributors, as well as the other Interstate distributors, are instructed and trained to utilize a sales presentation that concentrates initially almost exclusively on membership in FBP and which includes the following:

(a) an exaggerated, false and misleading series of representations concerning the uniqueness, value and utility of membership in FBP is presented;

(b) the potential customer is falsely and fraudulently informed that membership in FBP is "free" or "without charge," or to be given to the customer;

(c) the potential customer is informed that this "free" membership in FBP is not for sale at any price and is obtainable only through the immediate purchase of the vacuum cleaner and not in any other manner or from any other place;

(d) the potential customer is falsely and fraudulently informed that normal use of FBP membership will save him many times the cost of the vacuum cleaner.

32. On information and belief, the purpose and result of the above sales presentation and tying of the purchase of the vacuum cleaner to that of the membership in FBP is the effective achievement by the defendants of a position which enables them to distort the true value of the vacuum cleaner by diverting consumer attention away from the exorbitant and unconscionable price of the vacuum cleaner towards the "free" membership in FBP. Until recently, the price in New York was $399.95 plus sales tax of $24.00 for a total cash price of $423.95.

33. On information and belief, others of Interstate's Compact distributors are similarly engaged with FBP and Interstate in understandings or agreements as to the training, representations and sales.

34. As a further part of the aforesaid training and instruction, salesmen-employees of Compact Electra Corp. or the New York Compact distributors are instructed and trained to use various false and fraudulent representations and sales techniques, including but, not limited to:

a) the use of a "personal referral-recommendation technique" and "free gift technique" to initiate contract with potential consumers by inducing "invitations" to the consumers' homes,

b) the use of a "hidden sale technique" whereby the potential consumer is deceived as to the purpose of the salesman and is mislead to believe that the principal purpose of the salesman's visit will be and is to deliver a "free" gift and to offer membership in FBP.

35. On information and belief as a further part of the aforesaid training and instruction, and pursuant to said agreements and understandings, the salesmen-employees are instructed and trained to make false and fraudulent representations concerning the value and utility of the vacuum cleaner wherein the potential customer is told that the vacuum cleaner uses revolutionary new mechanical principles and attachments, making it a unique cleaning "system" that is in no way comparable with normal vacuum cleaners.

36. On information and belief, pursuant to the aforesaid agreements and understandings, the salesmen-employees of Compact Electra Corp. or the New York Compact distributors used and continue to use the aforesaid techniques and made and continue to make the aforesaid representations to plaintiffs and their class.

37. Because Compact Electra Corp. concentrates its sales efforts on lower-income persons, as alleged in paragraph 21, *supra,* it, in effect, segregates their market from the general market.

38. On information and belief, the aforesaid agreements, understandings, and contracts, including the franchise agreements, were entered into and complied with as part of, and in furtherance of, a conspiracy, combination, and contract, the purpose and result of which has been to restrain interstate trade and commerce in home

vacuum cleaners by foreclosing access to plaintiffs and their class and to other lower-income unsophisticated consumers by competing sellers of home vacuum cleaners, thereby allowing defendants to charge plaintiffs and their class an exorbitant price, far in excess of the fair market value of the vacuum cleaner and membership in FBP, and to sell products of an inferior quality, all to the injury of the plaintiffs and their class.

FIRST CAUSE OF ACTION:

39. As is more fully set forth above, beginning sometime prior to the filing of this complaint and continuing up to and including the date of the filing of this complaint, defendants have entered into an agreement to use and have in fact used an illegal tie-in arrangement in violation of Section 1 of the Sherman Act.

40. As a result of said tie-in arrangement, plaintiffs and their class have been injured in their person and property. Unless defendants are enjoined from continuing the illegal tie-in arrangement with others and between themselves and from enforcing the contracts with consumers thereunder, plaintiffs and their class will continue to suffer irreparable damages.

SECOND CAUSE OF ACTION:

41. As is more fully set forth above, beginning sometime prior to the filing of this complaint and continuing up to and including the date of the filing of this complaint, defendants have entered into contracts, combinations and conspiracies to defraud and deceive plaintiffs

and their class into purchasing the vacuum cleaner and membership in FBP at exorbitant prices. The aforesaid deceit and fraud were practiced on the plaintiffs and their class with full knowledge and expectation that plaintiffs and their class would be deceived thereby, and rely and act in reliance on fraudulent misrepresentations, to their detriment and injury in dealing with defendants.

42. The purpose, intent and effect of the aforesaid contracts, combinations and conspiracies was to restrain the interstate trade and commerce in home vacuum cleaners, buying service membership, or both, in that defendants knew, or should have known, that other sellers and manufacturers of vacuum cleaners and buying services could not and would not legally compete with the defendants insofar as the aforesaid fraud and deceit are illegal and barred by applicable state and federal laws. Defendants knew and intended that the aforesaid interstate trade would be restrained, and the free competition therein distorted or destroyed.

43. Such contracts, combinations and conspiracies amounted to *per se* violations of Section 1 of the Sherman Act and constituted restraints on interstate trade that were unreasonable in fact.

44. As a direct and proximate result thereof, plaintiffs and their class have been and will continue to be injured in that they have agreed to pay, and will agree to pay, excessive exorbitant prices for the vacuum cleaner and for the membership in FBP. Unless defendants are enjoined from further action and from enforcing said contracts, the plaintiffs and their class will continue to suffer irreparable injury.

WHEREFORE, Plaintiffs pray:

A. That the court adjudge and decree that the defendants have combined and conspired to restrain, and have restrained, interstate trade and commerce in the home vacuum cleaner market, in violation of Section 1 of the Sherman Act.

B. That the court further adjudge and decree that the defendants, their officers, directors, agents, and employees and all other persons acting or claiming to act on behalf of or in concert with the defendants be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, the offenses hereinabove alleged.

C. That the court further adjudge and decree that the defendants, their agents and their assigns be enjoined and restrained from enforcing or attempting to enforce any consumer contracts or obligations entered into with the plaintiffs or members of their class for the purchase of the vacuum cleaner and membership in FBP.

D. That the court determine the amount of damages suffered by the plaintiffs and their class as a result of the unlawful acts hereinbefore alleged and award judgment to the plaintiffs and their class against the defendants, jointly and severally, in triple the amount of actual damages sustained, together with plaintiffs' costs and reasonable attorneys' fees.

E. That the court award such other and different relief as may seem just, proper, and equitable.

Amended Complaint

Dated: May 10, 1974
Brooklyn, New York

ALLEN R. BENTLEY
/s/ John C. Gray, Jr.
JOHN C. GRAY, JR.
Attorneys for Plaintiffs
Brooklyn Legal Services Corp. B
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Brooklyn, New York 11201
(212) 855-8003

Of Counsel:

JANET BENSHOOF
ALLEN R. BENTLEY
DOUGLAS V. ACKERMAN

Answer to Amended Complaint of Defendant, A-T-O, Inc.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The defendant A-T-O, Inc., by and through its attorneys, Harris & Fredericks, as and for its answer to the amended complaint herein, respectfully alleges as follows:

I

PRELIMINARY STATEMENT

1. Denies each and every allegation set forth in paragraph 1 of the amended complaint, except admits that plaintiff in its amended complaint is seeking injunctive relief and treble damages under Sections 4 and 16 of the Clayton Act 15 U.S.C. Sections 15 and 26, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2.

II

JURISDICTION

2. Denies each and every allegation set forth in paragraph 2 of the amended complaint.

Answer to Amended Complaint of Defendant, A-T-O, Inc.

III

Parties

3. Denies knowledge sufficient to form a belief as to each and every allegation set forth in paragraphs 3 and 4 of the amended complaint herein.

4. Denies each and every allegation by plaintiffs set forth in paragraphs 5, 6 and 7 of the amended complaint.

5. Admits the allegations of paragraph 8 of the amended complaint.

6. Denies knowledge sufficient to form a belief as to each and every allegation set forth in paragraphs 9, 10, 11, 12 and 13 of the amended complaint.

IV

Statement of Facts

7. Denies each and every allegation by plaintiffs set forth in paragraph 14 of the amended complaint.

8. Admits the allegations contained in paragraph 15 of the amended complaint.

9. Denies each and every allegation set forth in paragraph 16 of the amended complaint, except admits that the vacuum cleaner manufactured by defendant Interstate is a canister type designed for residential home use.

10. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 17, 18 and 19 of the amended complaint.

Answer to Amended Complaint of Defendant,
A-T-O, Inc.

11. Denies each and every allegation in paragraph 20 of the amended complaint.

12. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 21 of the amended complaint.

THE TIE-IN ARRANGEMENTS

13. Denies each and every allegation in paragraphs 22, 23, 24, 25, 26, 27, 28 and 29 of the amended complaint.

CONSUMER EXPLOITATION

14. Denies each and every allegation in paragraphs 30, 31(a), 31(b), 31(c), and 31(d), 32, 33, 34, 35 and 36, of the amended complaint.

15. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 37 of the amended complaint.

16. Denies each and every allegation in paragraph 38 of the amended complaint.

FIRST CAUSE OF ACTION

17. Denies each and every allegation in paragraphs 39 and 40 of the amended complaint.

SECOND CAUSE OF ACTION

18. Denies each and every allegation in paragraphs 41, 42, 43 and 44 of the amended complaint.

Answer to Amended Complaint of Defendant, A-T-O, Inc.

First Affirmative Defense

19. This Court does not have jurisdiction over the subject matter of this action.

Second Affirmative Defense

20. The plaintiffs have failed to state a claim against defendant A-T-O, Inc., upon which relief can be granted.

Third Affirmative Defense

21. Plaintiffs have no standing to maintain this action.

Fourth Affirmative Defense

22. The plaintiffs do not plead an appropriate class action under Rule 23 of the Federal Rules of Civil Procedure and none of the plaintiffs have standing or capacity to represent the purported class.

Wherefore defendant A-T-O, Inc. prays that the instant action be dismissed with costs taxed against the plaintiffs in favor of the defendants; and for such other, further and different relief as to this Court may seem just and equitable.

Dated: New York, New York
July 9, 1974.

Harris & Fredericks
By /s/ Barry I. Fredericks
A Member of the Firm
Attorneys for Defendant A-T-O, Inc.
1271 Avenue of the Americas
New York, New York 10020
Tel. 212-489-1504

Affidavit of Hyman Sindelman

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

HYMAN SINDELMAN, being duly sworn, deposes and says:

1. I am one of the defendants in the above entitled action and am also the President of Compact Associates, Inc., Compact Bellerose, Inc. and Compact Electra Corp. I make this affidavit in support of my motion, as well as that of the aforesaid corporations (hereinafter collectively referred to as the "Compact Defendants") to dismiss the Complaint for failure to state a claim, or in the alternative, for a more definite statement, to strike certain prejudicial matter from the Complaint, and to dismiss the Complaint with respect to the Plaintiff, Cheryl Perry Hill, as time barred.

2. I have been advised by my attorneys that on a motion of this kind, the facts alleged in the Complaint will be deemed to be true (at least to the extent that they are not contrary to ordinary experience and logic or are not contradicted by irrefutable documentary evidence). However, the Complaint in this action makes numerous conclusions, assumptions and inferences which are untrue and indeed scandalous. My intention in this affidavit is

to give the Court some idea how the "Compact defendants" do business and of the market in which they operate.

3. Compact Electra Corp. (hereinafter referred to as "Electra") sells a home appliance system whose basic components are the Compact vacuum cleaner and polish aire floor waxer manufactured by A-T-O, Inc. Electra sells this equipment mostly to consumers who in most instances purchase the same on credit. The unpaid portion of the purchase price is evidenced by a retail installment contract widely in use in the State of New York. Annexed hereto as Exhibits B-1 to B-4 are the retail installment contracts into which the plaintiffs entered with Electra.

4. The components of the Compact Cleaning System are manufactured by A-T-O, Inc., Compact Associates, Inc. and others. This is important because the Complaint assumes that Electra purchases the entire system from A-T-O, Inc. and then resells the same to consumers at "exorbitant prices".

5. Our customers are referred to us by other customers or potential customers. Our sales agents visit the customers in their homes after appointments have been arranged. It is our policy to advise all potential customers at the time the appointment is arranged that one of the purposes of the visit is to sell a Compact home cleaning system of which the vacuum cleaner is an integral part.

6. The sales agents are carefully trained by high level employees of Electra. They are instructed and directed to make only factual statements about Family Buying Power, Inc. ("FBP"). The customer is indeed told that

a 1-year membership in FBP is without charge with the purchase of a Compact home cleaning system and that statement is true. Whether the customer even wants a membership in FBP (and many do not), the cash price for the Compact system is the same, namely $399.95. The price for the 1-year membership is $12.00 and should the customer wish to renew his, or her membership for another year, he or she would have to pay the $23.00 directly to FBP.

7. We sell less than one-half of 1% (.5%) of the vacuum cleaners sold in the New York City area. I do not know how many vacuum cleaners are sold through home solicitations in the New York City area, but I do know that we have many competitors who are larger and more successful than we. I know also that competition in home solicitation sales of vacuum cleaning equipment is so fierce that today Electra makes only 25% of the number of sales that it made in 1963.

8. Vacuum cleaners are a very common item. A dozen or more well known brands are currently being sold throughout the New York City area. The nationally known brands such as "Hoover", "Eureka" and "General Electric"—to name but a few—are advertised in all the communications media at an annual cost of many millions of dollars. As a result these brands are well known to the public. Electra, on the other hand, does not engage in—and cannot afford—any advertising of any kind. It and its products are unknown to the public. It therefore starts at a competitive disadvantage vis-a-vis the companies who sell the heavily advertised brands. Although I am prepared to defend the reliability, versatility and compactness of the Compact System against all of its

competitors, it is not true a unique product. Other products accomplishing the same objectives are not only available but they are available in every department store and shopping street in New York City. They are literally available "around the corner".

9. The Complaint alleges that we sell the Compact System at an exorbitantly high price. The Plaintiffs did not present a single fact to support that allegation. I would like to know what they are comparing our prices to. The truth is that our prices compare favorably with those of our competitors who are engaged in home solicitations. Home solicitation sellers are faced with higher selling expenses—above and beyond salesmen's commissions—than those distributing through retailers. This little known fact accounts for the high price of *all* products which are sold directly. See Victor P. Buell, *Door-to-Door Selling,* 32 Harvard Business Review, No. 3, p. 113. On the other hand, the advantage to the consumer from home solicitation sales is not inconsiderable. The consumer is able to get a demonstration on the premises and is in a position to judge better whether the product is useful to her. Very often the products sold *"door-to-door"* are superior in quality to those otherwise available, and we believe that our Compact home cleaning system is the best currently available anywhere in New York City.

10. One of the Plaintiffs, Cherryl Perry Hill, entered into a retail installment contract with the defendant Electra on March 29, 1969. See Exhibit B-1. On the same date her Compact home cleaning system including vacuum cleaner and accessories were delivered to her. Her one year membership in FBP commenced on that day. The

Affidavit of Hyman Sindelman

Compact defendants were served with the Complaint in this action some time after December 3, 1973. I am advised, and I believe, that Plaintiff Hill's Complaint is barred by the applicable Statute of Limitations.

(Sworn to by Hyman Sindelman March 14, 1974.)

Exhibit B-1, Annexed to Affidavit of Hyman Sindelman

[PHOTOSTAT]

(Opposite) ☛

RETAIL INSTALMENT CONTRACT
(Conditional Sale Contract)

Date 3/29/69 Buyer's Name Veronica Tranchein Perry

Seller Compact Electra Corp. 212 HI 5-2750
244-11 Jamaica Avenue
Bellerose, Long Island, N.Y. 11426
(Place of Business)

Co-Buyer's Name Judy Cheryl Perry

Address 1849 Montgomery St. Apt. No 1C

Installation Address if Different

Description of Goods and Services Sold (Including Model and Serial Numbers, state Cash Sale Price for each item)

Compact System Serial No. 2229365
Polishaire Waxer
Vibra Massage System
Vibra Hair Dryer Unit

Included without charge, a one year membership in Family Buying Power, Inc.

CASH PAID ON DELIVERY 45¢
Allowed $70.00 return of Waxer
Description of Goods Traded in & Trade in Of DC Cleaner

1. Cash Price	26945	~~$ 297.95~~
2. Sales Tax	13 50	~~10.00~~
3. Total Cash Sale Price	28345	$ 377.95
4. Total Down Payment	45	$
5. Unpaid Cash Balance (3 less 4)		$ 283.00
6. Insurance Premium if any		$ None
7. Official Fees if any		$ None
8. Principal Balance (Total 5, 6 & 7)		$ 283.00
9. Credit Service Charge		$ 50 84
10. Time Balance (Total 8 & 9)		$ 33384
Time Sale Price — (Total 3 & 9)		$

Time Balance is payable in 22 consecutive monthly instalments of $ 15 22 each, all payable on the same day of each month. The first payment becomes due 5/5/69 19____ (or one month from the date of this contract if not otherwise specified).

The Seller hereby sells and the Buyer hereby purchases for the time sale price and on the terms and conditions set forth herein, the above described merchandise. Delivery, examination and acceptance of the merchandise in the condition represented by the Seller is hereby acknowledged by the Buyer.

Title to the merchandise shall remain in the Seller as security for the performance of Buyer's obligations under this agreement. Buyer shall keep the goods safe, in good repair, free of all liens, taxes and charges, shall not transfer or dispose of any interest in this agreement or in the merchandise, and shall not remove the merchandise from Buyer's address set out above without Seller's prior written consent.

Non-performance or delay in the performance of any of Buyer's obligations shall constitute a default. In addition to all other remedies allowed by law, upon default Seller may declare all indebtedness owed under this agreement immediately due and payable. In addition, in the event of default in the payment of any instalment which continues for 10 days or more, Buyer shall pay a delinquency charge of 5% of such instalment or $5.00, whichever is less, and shall make such payment within one month of the default. Buyer waives jury trial in any action arising out of the transaction evidenced hereby. Seller or Holder is authorized by Buyer(s) to apply any payment received, first to any late charges due on prior delinquent payments and remainder to next succeeding instalment.

No waiver by Seller of any default or any remedy with respect to any default shall be effective unless in writing. No such waiver shall operate as a waiver of any other default or remedy or of the same default or remedy on a future occasion.

Buyer acknowledges notice of Seller's intent to assign this contract. Any assignee shall acquire all of Seller's rights and remedies. Buyer agrees not to assert any claim or defense arising out of this agreement against any assignee in good faith and for value to whom the Buyer has not mailed written notice of the facts giving rise to such claim within ten days after such assignee mails to Buyer at Buyer's address stated herein, notice of the assignment identifying this contract.

This writing may not be altered or amended other than by written instrument. In the event that any provision of this agreement is held unenforceable for any reason, all the remaining provisions of this agreement shall remain in full force and effect.

The Buyers hereby certify that all the statements in the credit statement part are true and complete and are made for the purpose of obtaining credit.

This contract contains the entire agreement between the parties and no warranties or representations, expressed or implied, and no statements, promises or inducements made by any party hereto or any party whatsoever, which are not contained in this written contract, shall be valid or binding, unless endorsed hereon in writing. This sale is final and no refunds will be made.

NOTICE TO BUYER

1. DO NOT SIGN THIS AGREEMENT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACE.
2. YOU ARE ENTITLED TO A COMPLETELY FILLED-IN COPY OF THIS AGREEMENT.
3. UNDER THE LAW, YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS TO OBTAIN A PARTIAL REFUND OF THE CREDIT SERVICE CHARGE.

THIS IS A RETAIL INSTALLMENT CONTRACT. BUYER ACKNOWLEDGES HAVING READ THIS CONTRACT AND HAVING RECEIVED A COPY EXECUTED BY THE SELLER. BUYER ACKNOWLEDGES RECEIPT OF ABOVE DESCRIBED MERCHANDISE.

RETAIL INSTALMENT CONTRACT

Compact Electra Corp.
(Corporate Seal or Typed Name of Seller)

Agent

Veronica Tranchein Perry (L.S.)
(Buyer's Signature)

Judy Cheryl Perry (L.S.)
(Co-Buyer's Signature)

Exhibit B-1

Affidavit of M. Robert Dortch

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

M. ROBERT DORTCH, being duly sworn, deposes and says:

1. I am the President of each of the Corporate defendants Family Buying Power (Inc., ("Family"), Nationwide Promotions, Inc. ("Nationwide"), Executive Buying Corporation ("Executive") and Family Cleaning Power, Inc. ("Cleaning") and am fully familiar with all of the facts set forth herein.

2. This affidavit is submitted in support of the instant motion by myself, Frank Dortch, Family, Nationwide, Executive and Cleaning for an order pursuant to F.R.C.P. Rule 12(b)(6) dismissing the Complaint for failure to state any claim upon which relief can be granted against the moving defendants or, in the alternative, for an order requiring a more definitive statement pursuant to F.R.C.P. Rule 12(e) and to strike certain portions of the Complaint pursuant to F.R.C.P. Rule 12(f).

THE COMPLAINT

3. This consumer class action was commenced by the filing of the Complaint on or about December 14, 1973

and the time for the moving defendants to answer, or move in regard to the Complaint has been extended to March 13, 1974. A copy of the Complaint is annexed hereto as Exhibit "A".

4. The Complaint alleges causes of action against the moving defendants for violations of Sections 1 and 2 of the Sherman Anti-Trust Act in that defendants A-T-O, Inc. ("A-T-O"), Compact Associates, Inc,. Compact Bellerose, Inc., Compact Electra Corp. (collectively referred to as "Compact") and Hyman Sindelman a/k/a Hy Delman ("Delman") combined and conspired to unreasonably restrain interstate trade or commerce and/or attempted to monopolize the door-to-door sale of vacuum cleaners in lower socio-economic areas by virtue of instructing salesmen to fraudulently induce the purchase of an allegedly inferior vacuum cleaner at an exorbitant price.

5. It is further alleged that insofar as the moving corporate defendants are concerned that the fraudulent sales practices involve a promotional arrangement whereby Compact offers a membership in Family, free of charge, to induce the purchase of ATO's vacuum cleaner.

6. Plaintiffs allege that Compact's sales personnel falsely exaggerated the value of the services to be rendered by Family and, in addition thereto, that an allegedly illegal tying arrangement, violative of Section 1 of the Sherman Anti-Trust Act, was created by giving away a membership in Family to induce the purchase of the vacuum cleaner.

7. I have been advised by my attorneys that in a motion to dismiss the Complaint, pursuant to F.R.C.P. Rule 12(b)(6), the well pleaded allegations of the Complaint

are accepted as true, but neither this Court nor the moving defendants are required to deem as true, erroneous conclusions of law or unwarranted insinuations, assumptions or deductions of facts. This affidavit is submitted for the sole and exclusive purpose of clarifying the Con plaint as it pertains to the moving defendants.

Operations of the Moving Corporate Defendant

8. Through various unrelated distributors Family solicits individuals throughout the United States to become members of its buying service. Such members pay an annual membership fee of $12, which fee is utilized by Family to defer the costs of preparing and mailing to members promotional literature including, but not limited to, an extensive catalog, introductory brochures, quotation sheets and a cost book. At the present time, Family has approximately 20,000 members.

9. The catalog contains over 8,000 items of merchandise, including many brand name consumer products. The catalog lists the suggested retail price and a favored price that would be offered to the general public by a discount catalog showroom. The initial package from Family also includes a price book which lists, for each item in the catalog, the price that members will pay for the merchandise. The price paid by the members for each item listed in the catalog is lower than the discount catalog price and considerably lower than the suggested retail price.

10. Further, members are advised that they may select any item of merchandise whether or not listed in the catalog, obtain a price from a retail outlet for such merchan-

dise and submit a quote to defendant Executive containing the name of the store, the item and model number and the price of such item. Defendant Executive attempts to obtain from one of its sources the same article of merchandise at a lower price than the quote received from the member. Defendant Nationwide acts in the same capacity as defendant Executive, except that its function is limited to obtaining quotations for the purcase of automobiles.

11. The sole function of defendant Cleaning is to market a complete line of liquid bottle and cleaning products, however, at the present time, this corporation is relatively dormant. Accordingly, defendant Cleaning has neither participated in the activities of the other moving corporate defendants nor are they presently marketing any products for the public. Therefore, as to Cleaning the Complaint should be dismissed.

12. In most instances the member will pay for the merchandise directly to defendant Executive and the merchandise is either shipped by Executive or shipped from one of Executive's courses.

13. Only members can avail themselves of the services rendered by Family, Executive and Nationwide and no member is compelled to avail themselves of any of such services. To the best of my knowledge, at no time has any party ever represented that any of the moving corporate defendants were engaged in a charitable enterprise. To the best of my knowledge, all members are aware of the fact that such corporations receive profits in connection with the sale of merchandise.

14. The buying service business is highly competitive and it competes in the sale of merchandise with the na-

tional, regional and local retailers (both discount and non-discount) as well as other buying services and other catalog mail-order houses. Many of the Companies which compete with the moving corporate defendants have significantly greater financial resources and we are an insignificant factor in our field.

Relationship with A-T-O, Compact and Delman

15. Several years ago, Family agreed to sell to Interstate Engineering, a Division of A-T-O, memberships in Family and Interstate in turn permitted their distributors to offer the memberships to their customers, in connection with the sale of A-T-O's vacuum cleaner. Thereafter, A-T-O severed their relationship with Family, however, Family continued to sell memberships to A-T-O's distributors. Compact is a distributor of A-T-O.

16. The sole arrangement between Family and Compact was that, in the event that Compact elected to avail itself to this promotional arrangement, Compact would be required to forward to Family the annual fee for the membership. This fee is utilized, as aforesaid, to defer the costs of printing and mailing promotional literature to the members.

17. No other payments were transmitted among A-T-O, its distributors, including Compact and Family.

18. At no time was any distributor of A-T-O compelled to avail themselves of the promotional arrangement nor was any purchaser of the vacuum cleaner required to become a member of Family.

19. This promotional arrangement has resulted in approximately 3,000 members joining Family during the last two years and to the best of my knowledge we have never received a Complaint resulting from any misrepresentation as to the services rendered by Family.

20. Other than as set forth herein, Family, Executive and Nationwide have never participated in the planning, preparation or implementation of the marketing arrangements pursuant to which A-T-O or their distributors sell their vacuum cleaner nor do I have any knowledge as to any of the other matters set forth in the Complaint.

21. The moving defendants herein are alleged to be liable to the plaintiffs solely and simply by reason of the fact that we permitted a membership in Family to be offered by plaintiffs as part of a sales promotional arrangement.

22. I respectfully submit that it would exacerbate the very essences of the anti-trust laws for this Court to hold, absent other factors, that whenever a manufacturer desires to promote the sale of its product by giving away another product, or service, an illegal tying arrangement occurs which is a per se violation of the Sherman Anti-Trust Act.

WHEREFORE, it is respectfully requested that the instant motion be granted dismissing Complaint as it pertains to the moving defendants or, in the alternative, that the moving defendants' motion be granted to the extent of compelling plaintiffs to submit a more definitive statement and that certain portions of the Complaint be stricken.

(Sworn to by M. Robert Dortch, March 11, 1974.)

Reply Affidavit of Hyman Sindelman

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK, }
COUNTY OF KINGS, } SS.:

HYMAN SINDELMAN, being duly sworn, deposes and says:

1. I am one of the defendants in the above entitled action and am also the President of Compact Associates, Inc., Compact Bellerose, Inc. and Compact Electra Corp. (hereinafter collectively referred to as the "Compact Defendants"). I make this affidavit in reply to the affidavit of Douglas V. Ackerman, Esq., sworn to May 20, 1974.

2. The Compact Defendants are in the business of selling vacuum cleaners and accessories; they are not in the business of selling memberships in Family Buyer Power, Inc. ("FBP"). In an effort to gain the goodwill of our customers and as a promotional device, we *give away free of charge* a one year membership in FBP. We have no agreement with anyone that compels us to give away this membership, and it often happens that a customer will purchase our equipment without wanting the free one year membership in FBP, in which event we do not furnish him with one.

3. If a customer does not wish to buy our equipment, we feel under no obligation to furnish him, free of charge,

a membership in FBP. Thus we do not tie the sale of the vacuum cleaner to anything. Mr. Ackerman states (affidavit, para. 6) that we won't "sell" a membership in FBP unless the customer buys a vacuum cleaner, and then he misrepresents my answers at the March 28, 1973 deposition. (Annexed hereto as Exhibit A are pages 96 and 97 of that deposition.) The pertinent portions of the deposition read as follows:

> "Q. Do you sell Family Buying Power memberships as part of this package contract deal?
> A. Not at the moment, no.
>
> * * *
>
> Q. In the year 1970, did you?
> A. No . . .
>
> * * *
>
> Q. You just furnished it without charge?
> A. Right.
>
> * * *
>
> Q. Have you ever sold, or given memberships in Family Buying Power to consumers who didn't purchase the rest of the items listed on your standard vacuum cleaner contract?
> A. You mean did anybody get a Family Buying Power membership that didn't buy a polisher? . . . We never furnished a membership to anybody that didn't buy a Compact."

Thus from the deposition it is clear that I never implied that we wouldn't "sell" a membership in FBP unless a customer purchased a vacuum cleaner.

Reply Affidavit of Hyman Sindelman

4. As I understand Mr. Ackerman, he complains because we don't sell or give away an FBP membership to those who do not purchase what we sell. Giveaway promotions are alternatives to advertising and they run throughout the economy. They are available at many gas stations with the purchase of a full tank. They are rampant in the mail order business. Annexed hereto as Exhibit "B" are some examples of free gift promotions that indicate how widespread the practice is.

Many sellers will provide ancillary services free as an inducement to buy the product and often a lively competition will commence with respect to the ancillary service. One example of this is an airline which serves a good "free" meal in flight and advertises the free meal as an inducement to the public to buy a ticket. No one would regard the free meal program and the free meal advertisements as illegal because the airline does not give away or sell the same meals to those members of the public who use competing airlines or prefer to drive.

5. Mr. Ackerman points to the Compact agreement with FBP as evidence that the Compact Defendants are prohibited "from selling the FBP plan as a separate item, apart from the vacuum cleaner" (affidavit, para. 7). Nothing in the agreement states or implies such a prohibition. Moreover it would be contrary to FBP's interest to impose such a prohibition in any agreement with Compact.

6. Any claim that the defendants have "market power" over membership buying services is sheer nonsense. The 1973 New York Telephone Yellow Pages lists more than thirty companies in this business in Manhattan alone. (See p. 328, copy of which is annexed hereto as Exhibit

C). The December issue of Readers Digest states that United Buying Service, Inc. has more than 3,000,000 members and Unity Buying Services more than 600,000 members. In comparison, FBP's 20,000 members (see Ackerman affidavit, para. 9) makes it insignificant.

7. Obviously every buying service tries to do something a little different than its competitors, and every buying service will urge this particular aspect of its services on its prospective customers. That FBP does so hardly makes any aspect of its service "unique" and plaintiffs' reliance on a Members Handbook in which FBP claims to provide a "unique" service, is meaningless (see Ackerman affidavit, para. 11).

8. Mr. Ackerman claims that the price for our equipment is "excessive" (see para. 13). However, Mr. Ackerman is incorrect, misleading and evasive.

a) Mr. Ackerman mentions only the "vacuum cleaner" and the "polisher". However, other attachments, including a vibrator, hair dryer, sudser-shampooer, sprayer and demother were sold as part of the package retailing for $399.95.

b) The prices ATO lists for the vacuum cleaner and polisher are "F.O.B. Factory" and, therefore, do not include the cost of freight from Anaheim, California to New York City.

c) The allegation of "excessive charge" has been made in more than thirty lawsuits over the last four years. Mr. Ackerman has not substantiated that charge with any evidence in any of them. Nor does he substantiate that charge here. The Compact Defendants are among many companies that

sell substantially the same equipment to customers at their homes. Why hasn't a retail price list or a retail installment contract from any of these companies been attached to Mr. Ackerman's affidavit? Our research indicates that we sell our equipment for less than most of our competitors and slightly more than some of our competitors in the home solicitation business.

d) In my affidavit sworn to March 14, 1974 in support of the motion of the Compact Defendants. I referred to an article of Victor P. Buell on Door to Door Selling in the Harvard Business Review in which the author said that "home solicitation sellers are faced with higher selling expenses—above and beyond salesmen's commissions—than those distributing through retailers." Mr. Ackerman continues to ignore this essential fact when discussing the price of any item sold directly to consumers at their homes.

9. I am advised by my attorney that no additional discovery is needed for the plaintiffs to support the essential allegations of their amended complaint. This is because the plaintiffs have had "extensive discovery" in connection with their Civil Court lawsuits on all aspects of the dealings between the Compact Defendants and their customers (amended complaint, para. 14). However, I wish to state unequivocally that since 1967, the Compact Defendants have entered into no agreements or understandings of any kind, whether written or oral, in which any of the other defendants controlled the manner in which we solicit our customers or use a membership in a buying service as a promotional device to sell our products.

Reply Affidavit of Hyman Sindelman

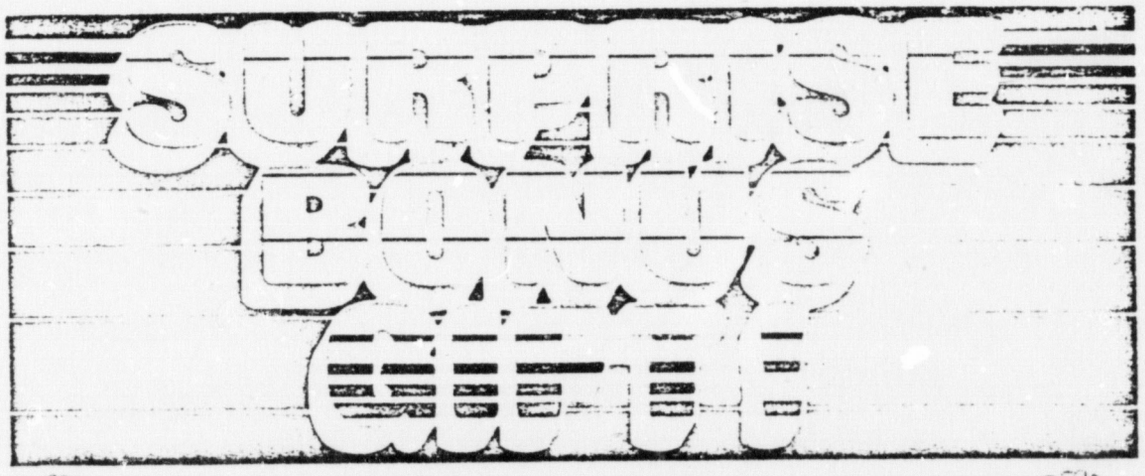
WHEREFORE, deponent respectfully prays that the cross-motion of the Compact Defendants be granted in all respects.

(Sworn to by Hyman Sindelman, June 4, 1974.)

Schedule B, Annexed to Reply Affidavit of Hyman Sindelman

[PHOTOSTATS]

(Opposite) ☛



FOR PREFERRED AMOCO OIL CUSTOMERS:

Just try the Indoor-Outdoor Amoco Vac described in the enclosed literature 15 days free...

And you'll also receive a FREE SURPRISE BONUS GIFT!

We can't tell you right now what gift you'll receive because, quite frankly, we don't know. A variety of items is being given away — all new merchandise, packaged in original cartons — and your Surprise Bonus Gift will be selected, at random, from this stock.

Where do these items come from? They are purchased around the country at fantastically reduced prices, and that's why we can offer one to you now — FREE — just as our way of saying "Thank You" for taking advantage of our no-risk Free Trial.

Remember: the gift is yours to keep, whether you decide to keep the Amoco Vac or not. So please return your Free Trial Certificate today.

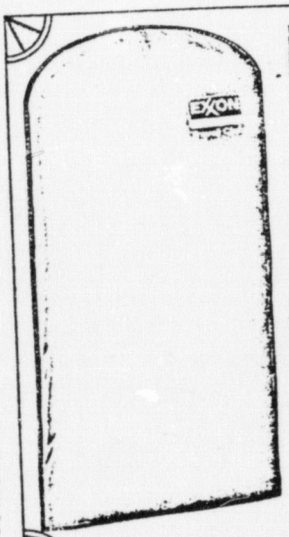
Important Notice: Because of the wide variety of items being given away, it is unlikely that anyone will receive the same gift twice — no matter how many items are ordered. In the event a duplicate is sent, we will gladly exchange it for a different gift on request.

AMERICAN

5-011424-000

Sch B-1

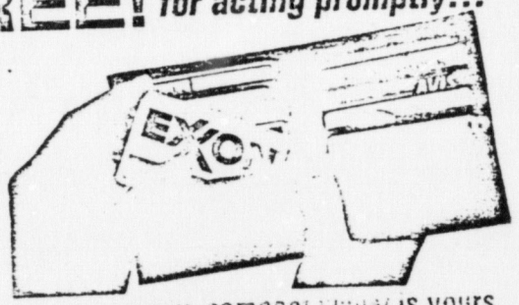
BOTH FREE! for acting promptly...



This rugged, handsome garment bag is yours when you become a member of ETC.

Use it for traveling or home storage. This useful EXXON Travel Club vinyl garment bag is reinforced at all points of wear for many years of service.

Made to rigid specifications, it has a full length zipper for easy loading. This ETC garment bag is easily washable with soap and warm water.



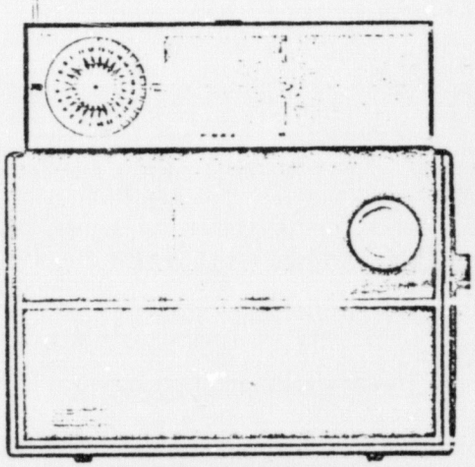
This handy, compact wallet is yours when you become a member of ETC.

You'll find this handy, long-lasting wallet will keep your credit cards neatly in order and ready for instant use. It's a great way to consolidate your important credit cards and it helps protect them from getting dog-eared or misplaced. It also has a special compartment for bills.

(This bonus for promptness is only valid for 10 days after you've received this notice, so mail your application for membership now!)

Sch B-2

Multi Band Radio
Entertainment
FREE for 15 days!



Yours FREE!

Zippered Tote Bag!

Smart-looking bright Orange Zippered Tote is great for overnight or the beach. Roomy inside, plus two convenient outer pockets carry hard-to-pack extras. Wipe-clean vinyl.

For BankAmericard® holders only

This is no ordinary radio. It's a real boredom-beater that puts you square in the middle of things — around the corner or around the world 24 hours a day. No matter what time it is or where you live, somewhere across the globe there's a new day dawning full of events that will take you away from the everyday. Turn on your imagination and the Overture takes over from there!

Here's what we mean:

- BE ON THE ALERT with local police and firemen. Hear it all on VHF_2 and the Police Band.
- BE INFORMED about the U.S. weather report for your area, 24 hours a day, on the Weather Band.
- BE FASCINATED listening to navigation reports on the Marine Band, phone conversations at sea on VHF.
- BE MOVED as you hear the vital communications from airport control towers on the VHF_1 Band.
- BE CAPTIVATED as you hear fascinating broadcasts in foreign languages on SW_1 and SW_2.
- BE SURPRISED to hear ship-to-ship and ship-to-shore reports on the Marine Band.
- BE ON THE SCENE at sports events, pop concerts, news-making events on the AM Band.
- BE ENTERTAINED with static-free symphonies and special interest programming on the FM Band.

The Overture lets you be anyone or anywhere you want to be! Every spot on the dial brings new adventure, some real drama being played out by unseen people in faraway places. Now you can be a part of that drama without leaving the comfort of your armchair.

The Overture has great educational value, too! If you have youngsters studying a foreign language, they'll hear that language spoken in its native accent and inflection. Geography, social studies, political science — all come alive with this versatile Multi Band Radio.

A handsome companion, the Overture has a padded grained vinyl case with chrome trim. And you can take it anywhere, because it plays on regular AC current or batteries. With the lid closed, it measures 12½" x 8¾" x 4⅝" deep.

The Overture Multi Band Radio

only $59.98 plus postage and handling

Sch B-3

AMOCO OIL FREE TRIAL MERCHANDISE OFFER

☐ **YES** I accept your 15-day Free Trial of the Safari Lite Outfit. If I am not completely satisfied with it, I may return the outfit at the end of my Free Trial and owe nothing. Otherwise, please add the price of $29.95 plus $2.34 shipping and handling (plus state and local taxes, if any) to my Amoco Oil Revolving Charge Account. The Free Gifts are mine to keep in either case.

If you need a replacement or additional card, please check ( ) here:
☐ replacement ☐ additional

3 FREE GIFTS!

You receive a 7-pc. Screwdriver Set, a 17-pc. Socket and Box Wrench Set PLUS a Handy Spatter Screen, all FREE TO KEEP, just for trying the Safari Lite Outfit!

BONUS GIFT! Don't forget the Surprise Gift added to your regular gift merchandise.

5-011349-000

Please Sign Name _____

446518 50E

MR. SIMON S. L. HERSON
24614 JAMAICA AVE
BELLEROSE
JAMAICA, NY. 11426

6500-6244007 19507-8323 446518-1110

If address is wrong, please write in new address below old address.

NON-TRANSFERABLE

FOR OFFICE USE ONLY
Amoco Oil Account Number:
469 068 408 1
Credit Rating: 1-A

Intended only for the Herson family

Detach before Mailing

47749

What do you do Mr. Herson ...

... when a power failure blacks out Jamaica?

Probably the same thing I used to do -- search for a flashlight and batteries ... or a candle and matches and wish you had a safe, bright light you could depend on. You don't need to wish any more:

TRY THE SAFARI LITE FREE FOR 15 NIGHTS!

You can carry this fluorescent lamp anywhere ... depend on it when you need it to give you safe, flameless light ... use it either on battery power or AC current. You'll find it's ideal for:

Camping or fishing in the Empire State ...
Roadside emergencies on New York highways ...

Sch B-4

AMOCO OIL [illegible]

Mail this card today for your 15-DAY FREE TRIAL of the SUPER-8 HOME MOVIE OUTFIT by ~~BELL & HOWELL~~

2 FREE GIFTS!

You get your choice of a Man's OR Lady's Watch PLUS a Suprise Bonus Gift, FREE . . . just for trying the Movie Outfit.

CHECK (√) YOUR WATCH CHOICE:

☐ Man's ☐ Lady's

☐ **YES.** Please accept my order for the Bell & Howell Super-8 Focus-Matic Zoom Home Movie Outfit. If I am not completely satisfied at the end of my free trial, I may return the Movie Outfit and owe nothing. Otherwise, please add the price of $199.95 plus $6.97 shipping and handling (plus state and local taxes, if any) to my Amoco Oil Revolving Charge Account. The Free Gifts are mine to keep in either case.

Supplies are limited! So Please Act Now!

Please sign name ✓ _____ Phone number _____

If you need a replacement or additional credit card, please check here:
☐ replacement ☐ additional

44687850E

MR. SIMON S. L. HERSON
24614 JAMAICA AVE
BELLEROSE
JAMAICA, NY. 11426

If address is wrong, please write in new address below old address

6500-5977011 64221-9550 446878-2211

DO NOT WRITE IN THIS SPACE

FOR OFFICE USE ONLY:
Amoco Oil Account Number # 469 058 408 1
Qualified Yes
Credit Rating A-1

NON-TRANSFERABLE

Intended only for Mr. Herson or members of the immediate family

You Are Entitled To This FREE BONUS GIFT!

VALIDATED BY H.E. McCarthy

S-010727-000

Sch B-5
Item

Schedule C, Annexed to Reply Affidavit of Hyman Sindelman

[PHOTOSTAT]

(Opposite) ☛

Buttons (Cont'd)

Samac Buttons Inc 53W36 — 244-2850
Sch-Ette Button Co 552 7Av — 947-7072
Schneider Internatl Ltd 1261Bway — 684-5860
SCHNER-BLOCK CO INC
115W40 — 564-5000
Schor Benj
Plastic Buttons of Every Description
242W36 — LO 3-3670
Schwab Import Co Inc 202W40 — PE 6-2431
SCHWANDA PLASTICS INC
315W35 — 563-1668
Schwanda Plastics Inc 315W35 — 563-1668
Schwartz H&S Button Co 240W37 — LOngacr 5-4237
Sea Coast Novelties&Trimmings Inc
247W35 — 563-6023
Seid Sheldon 1?? 5Av — 243-0011

SEMLER S & SON INC
BUTTONS — RETAIL
Complete Fashion Selections
• Exclusive Imports
Dressmaker's Supplies
Braid Trim-Yarn & Knit Acc.
Est. 1921
• Custom Made Belts
67 EAST 55th (Bet. Mad. & Park) | 355-0740

Senate Button Co Inc 241W36 — 565-5656
SENATOR CREATIONS INC
330W38 — 563-0216
Shantz Assocs Inc 130W42 — 279-2644
Sher Plastics Co Inc 450 7Av — 524-5590
Sherhandt John 104W32 — 736-8494
Sherman Supply Co 1440Bway — MU 9-5970
Shulman Morton 245E30 — MU 3-3686
Shumsky Harry&Bros 242W36 — LOngacr 4-2344
Siff Bros 251W39 — LO 5-7456
Silver Ben Inc 175 5Av — 254-4385
Silvers Buttons Inc 228W38 — PE 6-2468
SILVERSTEIN ARTHUR CO
Ocean Pearl Snail Buttons, Novelties
222W37 — LA 4-1458
Singer Kalman Co 37W17 — WA 9-4517
SLATER N G CORP
—See Our Display Ad Page 328—
??W19 — 924-3133
Smart Plastic&Covered Button Co
??W39 — 736-0190
Sorrylest Art Co Inc
Spraying, Buffing, Spindling And Crackling 315W36 — BR 9-2377
Standard Button Wks 269W39 — 565-5434
Sterling Button&Novelty Co Inc 242W36 — PE 6-5261
Stern Button Co 330 5Av — 691-4400
Stern Button Co Inc 230W39 — WIscnsn 7-8740
Stern Button Works 242W36 — 563-5635
Stern Button Works 242W36 — 736-1385
Stern Prods Corp 251W30 — 695-7373
STREAMLINE BUTTON INC
37W39 — WI 7-7484
Styles Unlimited Div Cresthill Industries Inc
315W35 — 695-0282
Styletrim Industries Ltd 347W36 — 524-4593
Su-Kel Novelty 467 S Bway Ynkrs — 914 423-2400
Sydmor Button Co 66W38 — BRynt 9-4181
Synthetic Plastics Corp 323W39 — LA 4-0600

T & M BUTTON INC
BUTTONS 'N BELTS
EVERY TYPE OF BUTTON IMAGINABLE
Custom Made Leather & Rhinestone Belts
333 7Av — 563-5861

Taub M Pearl Button Co 15W36 — LW 4-3770
Tender Buttons
Unusual, Antique and Blazer Buttons
143E62 — 758-7004

TENDER BUTTONS
UNUSUAL, ANTIQUE & BLAZER BUTTONS
143E62St(betLex-3rdAvs) — 758-7004

Thalheimer Bros 251W39 — LOngacr 5-4890
THINK IDEAS CO
—See Our Display Ad Page 328—
38W32 — 736-1215
Thomas Button Co 1234Bway — 689-8358
Thoro Products Inc 303 5Av — 686-0088
Tiger Button Inc 35W36 — 594-0570
Timely Button Co 264W40 — LA 4-0419
TOGS INC
The Button of Tomorrow
1290AvenueAmericas — 765-7870
Togs Inc 1290AvenueAmericas — 765-7870
Tonal Bros Mfg Co Inc
1197McCarterHwy
NewarkNJ-NYC TelNo — WO 2-4885
Tops-All Button&Novelty Co Inc 40W29 — MU 6-5775
Touger Lou Button Co 222W37 — 279-5823
Trim-Line Button Corp 242W36 — 244-5878
U&R-Leslie Corp 228W38 — WI 7-1530
Unique Lace&Trimming Co Inc
347W36 — LOngacr 4-2339
United Rhinestone Novelty Co
Stone Setting, Drilling on Plastics Buttons, Hair Ornaments, Shoe Heels
315W36 — LO 3-5843
Unity Button&Buckle Co Inc 127W36 — BRynt 9-5545
Universal Button Co 535 8Av — LOngacr 3-2287
V I P BUTTONS INC
40W37 — 255-3840
Van Naarden Louis 1350Bway — 524-2886

Listings of This Classification Are Continued in Next Column

Buttons (Cont'd)

VENUS MFG CO
COVERED BUTTONS
GANG DIES, BONNAZ EMBROIDERY
NAILHEADS & RHINESTONES
146W28St — CH 3-8965

Veterans Novelty Co 208W29 — LOngacr 3-7256
Volume Sales Co 264W35 — 563-0573
Wachtel Sydney M 270W38 — LW 4-0380
Wam Accessories Inc 42W39 — 354-7460
Waterbury Cos Inc 39W37 — 524-0471
WEBER & SONS BUTTON CO INC
Manufacturers of Polyester Buttons
1225Bway — MU 4-6656
Wein Harry&Co 35W35 — WIscnsn 7-8225
Weinberg Sol 29W37 — 594-5139
Weinstein Jos L 242W36 — 244-2738
Weinstein Larry 66W38 — LW 4-2593
Weimade Buttons Inc 20W20 — 929-0798
Western Button Co 15W26 — MU 4-2989
White Julian 611Bway — 533-1270
Wiener J C Co 228W38 — 279-7560
Wilenkin Estelle 242W36 — 244-4566
Windsor Trimmings Inc 264W35 — 695-5998
World Wide Button&Trimming Corp
1265Bway — 679-4780
Zager Harry 1133Bway — CH 3-7180
Zenith Stamping 327W36 — 736-4371

▶ Buttons—Advertising & Campaign

See "Badges"; also "Advertising Specialties"

Be quick to answer your telephone calls. Be slow to hang up when making a call. Give the other fellow at least one minute to answer.

▶ Buttons—Mfrs'. Equipment & Supls.

ADVANCE BUCKLE & BUTTON MOULD INC
MFRS. OF BUTTON, BUCKLE MOULDS
IVY LEAGUE BUCKLES, WIRE, PRONGS
& CLIPS FOR WIRE STITCH BUCKLES
335W35thSt — BR 9-7997

ALFA INDUSTRIES INC
MANUFACTURERS OF
Automatic Button Feeders
Hopper Sewing Buttons
BUCKLES, CHAIN & TRIMMINGS
248 West 35th St. | 868-0175

C & C BUTTON & TRIMG CO INC
—See Our Display Ad This Page—
318W39 — 279-1184
Colorite Industrial Dyers Inc 325W37 — 524-9593

COLUMBIA BUTTON & NAILHEAD CORP
Manufacturers - Button & Buckle Moulds
Nailheads & Nailhead Trimmings
Machine Dies For Cloth Covering
20GreeneSt — RA 5-2100

DB DIE WORKS
Established 1911 Dies Machines for Covered Buttons, Buckles, Novelties
306W37 — BR 9-8330
EISEN BROS INC
—See Our Display Ad This Page—
239W39 — 563-5323
EMPIRE STATE METAL PRODS INC
Manufacturer of Buckle and Button Molds for Covering - Equipment
33-02SkillmanAv LICity — 361-2929

Listings of This Classification Are Continued in Next Column

BUTTONS
BUCKLES
METAL BUTTONS •
METAL BUCKLES •
nailheads • clips
eyelets • closures
settings • jewels
moulds for covering
HAND POLISHED
GLITTER FINISH
jewel buttons
rimmed polyester
washable buttons
563-5323
239 w. 39th st., n.y.c.
eisen bros. inc.
stock on hand • immediate delivery •

MANUFACTURERS & DESIGNERS
BUTTON & BUCKLE MOULDS
NAILHEADS • SPOTS • RHINESTONES • JEWELS
SETTINGS • CLIPS • PLASTIC ORNAMENTS
EYELETS • METAL CORNERS • ORNAMENTS
"Our 58th Year"
Prompt Service/Technical Assistance Free
HAND, FOOTPOWER AND AUTOMATIC
MACHINES & DIES { for attaching and covering
"Visit Our Showroom For Stimulating New Items"
WRITE OR PHONE FOR OUR NEW & COMPLETE CATALOGUES #65 & #72
279-1184
318 West 39th St., New York, N.Y.
C & C Button & Trimming Co., Inc.

Buttons—Mfrs'. Equipment & Supls. (Cont'd)

HANDY BUTTON MACH CO OF NY INC
Manufacturers Button & Buckle Moulds
Hand, Foot, Automatic Machines - Dies
"In Queens Just 15 Min. From Manh"
50-05 47Av Wdsd — 446-1900

Holub-Dusha Co 1799 1Av — AT 9-5520
Larry K Button Co 269W39 — 565-6921
LIBERTY DIE & BUTTON MOULD CORP
438W37 — 594-1130
Master Cutting Table Co 50W27 — AL 4-2781
RG Button Co 1265Bway — 684-5375

RENT-AID SYSTEMS INC
AUTOMATIC BUTTON FEEDING EQUIP
SHANK AID FOR SHANK BUTTONS
BUTTON AID 2 & 4 HOLE BUTTONS
6NeilCt Oceanside — 516 678-1580

Rosen Covered Buttons Inc 347W36 — PE 6-0794
Samson World-Wide Ltd 545 8Av — 868-2719
Singer Al Co 150 5Av — 675-6083
Value Moulding Corp 347W36 — 565-5515

▶ Buyers

See "Auctioneers' Merchandise Bought"; also "Resident Buyers"

▶ Buyers—Information Svce.

Metropolitan Buying Group Inc
51White — 966-5990

▶ Buyers' Service

A M C Stores 1440Bway — 736-4000
BD's Stores 1170Bway — MU 6-0297
Better Buying Svce Of America
400MadAv — 371-9800
Betty Cohn Inc 225W34 — 947-3755
Buying&Research Assocs 991 6Av — LA 4-7270
CBC Travel Inc 39W32 — 868-1810
Colette Bridal Buying Svce Inc 7ParkAv — OR 9-7266
COM-PU-SHOP INC
1697Bway — 586-7920
Concept Buying Svce Inc
Resident Buying Service, Dealing with Imported Products - World Around
230 5Av — 684-5935
Consumer Buying Club 39W32 — 868-1830
Da Silva Nelson 315W77 — 874-2514
Dahlman Warhurst Inc 1440Bway — 354-7007
Erie Clothing Co 362 5Av — 244-2485
Factor Greenstein
Bookkeeping Dept 225W34 — 564-1639
Buyg Ofc 225W34 — 564-6191
Farnsworth Buying Svce 352 7Av — LA 4-1883
Fashion Buying Svce 225W34 — 244-1360
Gamble Corporate Buying 450W33 — 560-1500
Golomb-Paul&Co 225W34 — 736-9193
Goodman Lee 250W57 — 582-3850
H&H Buying Svce 1440Bway — 594-8622
HW Mdsng Co 520 5Av — 869-3609
Harris Shirley Buying Office 370 7Av — LA 4-6035
Harvey's Stores 150E69 — 734-0090
Jones&Guerrero Co Inc 2ParkAv — 685-7261
Kaye Assocs 450 7Av — 524-0129
Krauss Co Ltd 116W32 — LO 3-6359
Levy Sy Assocs 1384Bway — 354-8060
Luftig&Toback Inc 225W34 — CH 4-3775
Markay Buying Corp 393 7Av — 736-6135
Miesky Joseph 519 8Av — PE 6-9125
Neiman Harry 345 7Av — 947-4616
Playtime-Fun Inc 200 5Av — CH 3-7778
Price Stella 151W40 — BR 9-4540
Recreational Resources Inc 350 5Av — 695-6620
Rubin Murray 264W40 — 563-2184
Russo Jean 202W40 — 594-2966
Scheiman Marvin Assoc 225W34 — 594-2740
Shaffir A 303W42 — PL 7-6210
Shirley Harris Buying Office 27W72 — TR 3-9221
Staff Interiors
333JerchoTpk JrchoLI — 516 681-9200
TT&T Buying Svce 2566 7Av — 925-1400
Tall Assocs Inc 1384Bway — 279-6036
UNIQUE BUYING SVCE
Substantial Savings Automobiles Household Needs 30E42 — 972-0140
United Buying Svce Inc 1855Bway — 581-0544
United Buying Svce Inc 1855Bway — 581-9494
Value-Mart Inc 393 7Av — 868-7883
Vanity Inc 500 7Av — PE 6-3953
Venture Mdsng Corp 53W43 — 867-5443
Youth Fashn Guild 353 5Av — 689-8381

▶ Buying Offices

See "Resident Buyers"; also "Purchasing Service"

▶ Buzzer Systems

See "Calling, Paging & Signaling Equip. & Systems"; "Intercommunication Equipment, Systems & Service"

▶ Cabana Clubs

See "Clubs"

For better service—consult the directory when in doubt about the phone number you want.

SCHEDULE C

Affidavit of Robert W. Limacher

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF CALIFORNIA)
COUNTY OF) SS.:

ROBERT W. LIMACHER, being duly sworn, deposes and says:

1. I am the President of the Interstate Engineering Division of A-T-O, Inc., one of the defendants in the above entitled action; that I am fully familiar with the facts and circumstances set forth herein, and make this affidavit in support of the defendant A-T-O's application to dismiss the instant action.

2. The complaint herein alleges that the defendant A-T-O, through its division, Interstate, entered into an agreement with Family Buying Power wherein Family Buying Power would franchise or license Interstate distributors to sell memberships in Family Buying Power in connection with the sales promotion of Interstate's Compact Vacuum Cleaners. The plaintiffs also charge that Interstate supplied training and materials to its distributors to use in connection with the sale of the defendant's vacuum cleaners and membership in Family Buying Power's progress. Based upon the foregoing allegations plaintiff seeks to charge the defendant A-T-O with violation of the anti-trust laws.

3. The complaint herein is devoid of substance contra to the operative facts. The relevant matters are as follows:

(a) In late 1967 and early 1968 Interstate purchased membership certificates directly from Family Buying Power which it resold to its distributors. During that period of time there was no contractual relation between Family Buying Power and Interstate other than the fact that Interstate purchased membership certificates from Family Buying Power which Interstate made available to its distributors in connection with the sale of Interstate Compact Vacuum Cleaners.

(b) In 1968 the Federal Trade Commission raised the question of the propriety of the aforesaid practice, and deponent and his staff and attorneys met with the Federal Trade Commission in an effort to work out a usable format for Interstate to be able to use the Family Power program in connection with the sale of its Compact Vacuum Cleaners in a manner acceptable to the Federal Government. In November, 1968, the Federal Trade Commission advised Interstate that it did not believe a suitable arrangement could be effectuated. (A copy of said letter is annexed hereto as Exhibit A).

(c) As a result of the position taken by the F.T.C., Interstate sent out bulletins to all its distributors advising them to forthwith discontinue any further use of Family Buying Power programs in connection with the sale of its Compact Vacuum Cleaners, and so advised the F.T.C. of this action. (A copy of the bulletin is annexed hereto as Exhibit B).

(d) On December 3, 1968 Interstate notified Family Buying Power that its use of Buying Power's shopping service was being discontinued. (A copy of that letter is annexed hereto as Exhibit C).

(e) Since November, 1968, Interstate has not purchased or otherwise provided to its distributors any Family Buying Power memberships, and to the best of Interstate's information its distributors discontinued the use of Family Buying program. Moreover, at that time Interstate ceased supplying its distributors with any sales promotion or materials which in any way directly or indirectly related to Family Buying Power Program.

4. The complaint charges the defendant A-T-O with participating in a conspiracy directed toward monopolizing the home vacuum cleaner market, and of carrying out acts in furtherance of interstate trade and commerce with respect to said market. An investigation of the economics of the home vacuum cleaner market, and an analysis of the percentages of the market controlled by various companies clearly belies plaintiff's allegations that defendants herein were engaged in any attempt to monopolize said market. The relevant factors related to the economic relationship between the defendant A-T-O and its distributor Hy Delman, and the impact of same on the home vacuum cleaner market are hereinafter set forth:

(a) The defendant Hy Delman, through his companies Compact Associates Inc., Compact Bellerose Inc. and Compact Electra Corporation purchased, as a distributor, Compact Vacuum Cleaners directly from Interstate. (A schedule of Mr. Delman's purchases are annexed hereto as Exhibit D). The defendant Interstate, in no way, either directly or indirectly, controlled or directed Mr. Delman's resale of said vacuums.

(b) In 1971 Mr. Delman's total purchases of Compact Vacuum Cleaners from defendant Interstate approximated $120,000. During the same year the defendant In-

terstate's total dollar sales to all its distributors approximated $1,466,000. In 1972 defendant Interstate's total sales to defendant Delman equalled a dollar amount totalling approximately $125,000, while its total dollar sales to all its distributors in 1972 approximated $2,140,000. It is, therefore, apparent that Interstate's total sales are not substantially dependent upon purchases made by Delman.

(c) The estimated total retail selling price of vacuum cleaners sold by Interstate to all of its distributors in 1971 totalled approximately $7,182,855. This figure, when contrasted with the sales of Electrolux, Kirby, Rainbow and other manufacturers of vacuum cleaners sold on a house to house basis, indicates that Interstate does not control a substantial share of the market. (See schedule annexed hereto as Exhibit L.)

(d) In 1972 Interstate's total retail sales to its distributors was $11,389,779. In the same year Electrolux realized approximately $250,000,000 from the sale of its vacuum cleaners, Kirby $95,000,000, and as in the year 1971, several other manufacturers realized sales far greater than that of defendant A-T-O.

5. The economic information attached to this affidavit clearly demonstrates that the defendant A-T-O by and through its division Interstate was in no way involved in any attempt to monopolize the house to house vacuum cleaner market, and that plaintiff's claim of monopolization is totally without foundation.

6. At no time did Interstate require its distributors to buy, use or participate in the Family Buying Power program. As of the present time Interstate is not directly

or indirectly involved with the Family Buying Power program.

ROBERT W. LIMACHER

Subscribed and sworn to
before me this 15th day
of May, 1974.

VIRGINIA M. KELLER
Virginia M. K ller
Notary Public—California
Orange County
My Commission Expires Feb. 27, 1977

(Official Seal)

Exhibit A, Annexed to Affidavit of Robert W. Limacher

FEDERAL TRADE COMMISSION
Washington, D. C. 20580

Office of the Secretary

Nov. 26, 1968

Interstate Engineering Division,
"Automatic" Sprinkler Corporation,
522 East Vermont Avenue,
Anaheim, California. 92805

Attention: Mr. Robert W. Limacher,
President.

Re: Interstate Engineering Corporation, et al.,
Docket C-514.

Gentlemen:

The Commission is in receipt of your communication and that of your counsel John W. Douglas, dated July 10, 1968, with attached exhibits, which have been filed as a supplemental report showing the manner and form of your compliance with the order to cease and desist issued on June 21, 1963, with respect to your method of marketing and promoting your "Compact Home Renovating Systems".

The Commission has reviewed this material and has concluded that the actions set forth therein did not constitute compliance with the order to cease and desist.

The sales plan described in the report, although of a different nature from the one involved at the time of the order, still includes the "referral" aspect. While purchasers are not offered a direct benefit in the form of

commissions for furnishing the names of prospective customers, they are, as a part of the package, offered membership in the buying service with all the representations of savings which will flow from that membership in the purchase of other products. The Commission is of the view that the new program constitutes a change in the form but not in the substance of the prior selling program and, therefore is not in compliance with paragraphs 1(e) and 2(a) of the order to cease and desist.

The staff has been instructed to obtain, in an expeditious manner, such revisions in your practices as are necessary to obtain compliance with the order on pain of the institution of a civil penalty investigation.

By direction of the Commission.

JOSEPH W. SHEA
Secretary

cc: George E. Gute, Esquire,
Darling, Shattuck, Hall & Call,
523 West Sixth Street,
Los Angeles, California. 90014

John W. Douglas, Esquire,
Covington & Burling,
Union Trust Building,
Washington, D.C. 20005

Exhibit B, Annexed to Affidavit of Robert W. Limacher

INTERSTATE ENGINEERING
A Division of "Automatic" Sprinkler Corporation of America
522 East Vermont Ave., Anaheim, California 92805
(714) 772-2811

Registered Mail

November 22, 1968

Federal Trade Commission
Washington, D. C. 20580
Attention: Mr. Berry W. Stanley, Chief
Division of Compliance

Re: Docket No. C-514
Interstate Engineering

Dear Mr. Stanley:

After considering carefully the matters discussed in your office with our attorneys, John Douglas and George G. Gute, on November 19, 1968, Interstate Engineering has discontinued all use of the Family Buying Power, Inc. program. Furthermore, all of Interstate's Compact Vacuum Cleaner distributors and Vanguard Home Fire Alarm distributors have been notified to cease using the Family Buying Power, Inc. program by November 26, 1968. Interstate's current thinking is to confine its activities to manufacturing the finest products available and not to supply a substitute sales promotion program to its distributors.

Sincerely,

ROBERT W. LIMACHER
President—Interstate Division

RWL:v

cc: John Douglas, Esq.
George G. Gute, Esq.
All Compact Vacuum Cleaner Distributors
All Vanguard Home Fire Alarm Distributors

Exhibit B, Annexed to Affidavit of Robert W. Limacher

INTERSTATE ENGINEERING
A Division of "Automatic" Sprinkler Corporation of America
522 East Vermont Ave., Anaham, California 92805
(714) 772-2811

IMPORTANT

November 22, 1968

ATTENTION ALL COMPACT-VANGUARD DISTRIBUTORS

SUBJECT: FEDERAL TRADE COMMISSION
FAMILY BUYING POWER, INC.

As you may be aware, last December the Federal Trade Commission required that Interstate file a report detailing our current sales program. Such a report was made early in 1968 and has been the subject of discussions and a thorough review by the Federal Trade Commission. On November 19, 1968, Interstate was advised that any further use of the Family Buying Power, Inc. Program by Interstate and its Compact-Vanguard Distributors would result in an immediate investigation of Compact-Vanguard Distributors and the filing of a civil penalty action by the Federal Trade Commission. The Commission further advised Interstate that the only way to eliminate the necessity for such a course of action was to completely discontinue the use of the Family Buying Power, Inc. Program within seven days from November 19, 1968. Interstate is sending to the Federal Trade Commission official notification that Interstate has abandoned all use of the Family Buying Power, Inc. Program and is notifying, by registered mail, all existing Compact-Vanguard Distributors to completely discontinue, not later than November 26, 1968, any further use of the Family Buying Power, Inc. Program in connection with the sales of Compact Vacuum Cleaners and Vanguard Home Fire Alarms.

Exhibit B, Annexed to Affidavit of Robert W. Limacher

Compact-Vanguard Distributors, for credit, should return to Interstate, by registered mail, any unused membership certificates in Family Buying Power, Inc, which are not needed to complete sales made before November 26, 1968.

The attitude of the Federal Trade Commission is that the Family Buying Power, Inc. Program, as used to promote the sales of Compact-Vanguard, might lead prospects to believe that the product can be obtained at no cost without giving a full and complete disclosure of all the facts and circumstances. The Federal Trade Commission also pointed out that the savings available through shopping services might be obtained without requiring the purchase of a product in order to be eligible for such savings.

Interstate has not been pleased with the sales results obtained through using Family Buying Power, Inc. as a sales promotion. Interstate is currently of the opinion that, rather than our offering our Compact-Vanguard Distributors a substitute sales promotion program, it would be better for each Compact-Vanguard Distributor to be free to use a Sales program best suited for the Distributor's area of the country and best suited for the Distributor's individual ability. Apparently we are not alone in our thinking, as this same procedure is being followed by many of our largest competitors.

Hereafter, Interstate will expend its full efforts in manufacturing the finest products available for distribution through independent Distributors.

ROBERT W. LIMACHER
President—Interstate Division

H. Kennth Yager
National Director
VANGUARD Sales

Lee Zobel
National Director
COMPACT Sales

Exhibit C, Annexed to Affidavit of Robert W. Limacher

INTERSTATE ENGINEERING
A Division of "Automatic" Sprinkler Corporation of America
522 East Vermont Ave., Anaheim, California 92805
(714) 772-2811

December 3, 1968

Mr. M. Robert Dortch
Nationwide Promotions, Inc.
P.O. Box 189
Plainview, New York 11803

Dear Bob:

At the close of business on November 25, 1968, Interstate removed all inventory from our stockroom covering Family Buying Power, Inc.

All enrollment forms have been destroyed by Interstate, as well as any material where the names Interstate, Compact or Vanguard appeared. The balance of the Family Buying Power, Inc., sales promotion material is being shipped direct to your attention for your future use.

It should be understood that in accordance with the request made by the Federal Trade Commission on November 19, 1968, Interstate and all Compact-Vanguard Distributors were to discontinue using the Family Buying Power, Inc., sales promotion program.

Interstate is shipping the balance of our inventory, freight collect, to your personal attention and we hope that the thousands of dollars of unused material can be helpful in your carrying on the development of your business through channels other than with Compact-Vanguard Distributors.

Exhibit C, Annexed to Affidavit of Robert W. Limacher

It has been a pleasure to have worked with you and we sincerely regret that the request of the Federal Trade Commission made it necesary for us to abandon the Family Buying Power, Inc., sales promotior program.

Sincerely,

ROBERT W. LIMACHER
President—Interstate Division

RWL:de

Exhibit D, Annexed to Affidavit of Robert W. Limacher

[PHOTOSTAT]

(Opposite) ☛

HY DELMAN'S SALES FOR COMPACTS--
1969 -- 1973

	1969	1970	1971	1972	1973
January	152	252	80	248	208
February	0	0	241	201	0
March	356	320	160	148	280
April	180	0	160	180	0
May	0	500	202	208	248
June	168	0	228	160	248
July	180	604	148	180	0
August	240	148	148	4'6	248
September	169	148	229	0	0
October	156	308	148	228	498
November	240	160	329	146	0
December	0	160	148	208	
TOTALS	1840	2600	2325	2221	1730

EXHIBIT D

Exhibit E, Annexed to Affidavit of Robert W. Limacher

[PHOTOSTATS]

(Opposite) ☞

(a) The estimated total retail price and the estimated total number of vacuum cleaners sold in the United States in 1971 on a house-to-house basis together with an estimated breakdown by manufacturer is as follows:

Electrolux	$250.00	x	800,000	=	$200,000,000
Kirby	$300.00	x	300,000	=	$ 90,000,000
Rainbow	$300.00	x	36,000	=	$ 10,800,000
Filter Queen	$300.00	x	48,000	=	$ 14,400,000
Airway	$250.00	x	12,000	=	$ 3,000,000
Bison	$300.00	x	48,000	=	$ 14,400,000
Fairfax S-1	$350.00	x	24,000	=	$ 8,400,000
Compact	$279.00	x	25,745	=	$ 7,183,000

(b) The estimated total retail price and the estimated total number of vacuum cleaners sold in the United States in 1972 on a house-to-house basis together with an estimated breakdown by manufacturer is as follows:

Electrolux	$250.00	x	1,000,000	=	$250,000,000
Kirby	$300.00	x	350,000	=	$ 95,000,000
Rainbow	$300.00	x	30,000	=	$ 9,000,000
Filter Queen	$300.00	x	54,000	=	$ 16,200,000
Airway	$250.00	x	12,000	=	$ 3,000,000
Bison	$300.00	x	44,000	=	$ 13,200,000
Fairfax S-1	$350.00	x	24,000	=	$ 8,400,000
Compact	$289.00	x	39,411	=	$ 11,390,000

This estimate was based on field experience and knowledge without any actual figures from the companies themselves. Additional information was gained from the Vacuum Cleaners Manufacturer's Association to which most vacuum cleaner manufacturers reply.

EXHIBIT E

E-1

INDUSTRY SALES REPORT

HOME TYPE ELECTRIC VACUUM CLEANERS FOR ENTIRE INDUSTRY

Compiled by Ernst & Ernst for Vacuum Cleaner Manufacturers Association
1615 Collamer Road, East Cleveland, Ohio 44110

YEARS	NUMBER OF UNITS 1972	1971	% INCR. (DECR.)	DOLLAR RETAIL VALUE 1972	AVERAGE	1971	AVERAGE
DECEMBER							
Upright							
Canister							
Cylinder							
U.S.A.	610,669	606,445	.7	52,148,313	85.40	49,836,510	82.18
Foreign	14,738	17,316	(14.9)	1,166,779	79.17	1,030,933	59.54
TOTAL	625,407	623,761	.3	53,315,092	85.25	50,867,443	81.59
Hand							
U.S.A.	16,813	29,387	(42.8)	333,120	19.81	623,611	21.22
Foreign	1,002	600	67.0	17,220	17.19	10,200	17.00
TOTAL	17,815	29,987	(40.6)	350,340	19.67	633,811	21.14
YEAR-TO-DATE 12 MONTHS							
Upright							
Canister							
Cylinder							
U.S.A.	8,116,347	7,755,112	4.7	693,447,858	85.44	618,424,023	79.74
Foreign	220,254	218,206	.9	14,355,100	65.18	12,605,065	57.77
TOTAL	8,336,601	7,973,318	4.6	707,802,958	84.90	631,029,088	79.14
Hand							
U.S.A.	202,351	272,685	(25.8)	4,122,403	20.37	6,034,606	22.13
Foreign	13,642	8,375	62.9	238,508	17.48	198,054	23.65
TOTAL	215,993	281,060	(23.2)	4,360,911	20.19	6,232,660	22.18

ISSUED: FEBRUARY 14, 1973

C-2

Exhibits Attached to Affidavit of Douglas V. Acherman, Sworn to May 20, 1974

[PHOTOSTATS]

(Opposite) ☛

A Division of A-T-O Inc.

INTERSTATE ENGINEERING

522 EAST VERMONT AVE., ANAHEIM, CALIFORNIA 92805 • (714) 772-2311

DISTRIBUTOR FRANCHISE AGREEMENT

APPOINTMENT, PRODUCTS, TERRITORY, TERM

1. The Company hereby appoints the Distributor as a distributor for the promotion, sale and service of those products of the Company listed in Paragraph 35 and such other products of the Company as may be designated by the Company, from time to time (the said products listed and those products as may be designated by the Company from time to time are hereinafter called the "Products") in the described area of primary responsibility (hereinafter called the "Area of Primary Responsibility").

This Distributor Franchise Agreement made this 1st day of April, 19 71 by and between Interstate Engineering, a Division of A-T-O Inc. (herein called the "Company"), and Hy Delman Compact Assoc., Inc. 24614 Jericho Turnpike located at Bellerose (city), New York (state), (herein called the "Distributor").

In consideration of the mutual covenants and promises between the parties as herein contained, the parties hereto agree as follows:

The appointment of the Distributor pursuant to this Agreement is made by the Company on an exclusive basis, in that the Company shall not designate anyone else to have primary responsibility for the sale and service of the Products in Distributor's Area of Primary Responsibility so long as Distributor is not in default hereunder and the Agreement continues in effect. Due to the fact that millions of Company's Products have been sold and from time to time require service, parts and supplies, Company reserves the right to authorize others to sell repair and replacement parts and supplies in Distributor's Area of Primary Responsibility.

PRICES, DISCOUNTS, TERMS OF SALE

2. Pursuant to the terms and provisions of this Agreement, each month the Company shall sell and the Distributor shall purchase from the Company, the Products in an amount not less than the volume requirements stated in Paragraph 36. If this Agreement be renewed without change of Area of Primary Responsibility, the last scheduled quota shall not be increased by more than 20% in any one year.

3. Unless otherwise agreed upon in writing between the Company and the Distributor, terms of sale shall be cash with orders.

4. At any time and from time to time during the term of this Agreement, the Company shall have the right to modify, amend or change the prices and/or discounts as then in effect by giving notice of such modification, amendment or change to the Distributor. Such modification, amendment or change and the terms and provisions thereof shall be determined by the Company in its sole discretion, and such action of the Company shall be without liability to the Distributor.

5. The Distributor shall pay, in addition to the price or prices specified for the Products pursuant to this Agreement, the amount of any tax upon or payable or collectable by the Company with respect to or which is ascertained by reference to or increased by any sales, deliveries or orders hereunder or by virtue of any present or future federal, state, municipal or other law applicable thereto.

6. The Distributor shall not withhold payment to the Company because of any damage arising out of the transportation of the Products from the Company to the Distributor, nor shall the Distributor set off against payment to the Company any claims of the Distributor against the Company. The Distributor agrees not to deduct from remittance to be made to the Company any charge for services, parts, or other items until the said charges have been accepted and approved in writing by the Company.

APPROVAL OF ORDERS

7. All orders from Distributor with respect to the Products are subject to the acceptance and approval of the Company. In determining whether to accept and approve an order from the Distributor, the Company may consider the financial position and credit rating of the Distributor, and the location of the place of business of the Distributor whereat the Products covered by said order are to be resold and the ability of the Distributor to adequately service said products.

Exhibit - 1

PLAINTIFFS' EXHIBIT A

8. The Company expressly reserves the right to defer, postpone or forego any shipments of the Products on account of procedures or priorities established by the United States Government or its agencies, because of production failures, strikes or other labor disturbances, inability or delay in securing raw materials or other supplies, floods, fires, accidents, wars or because of other causes or conditions beyond the Company's control. The Distributor agrees not to promise delivery of any Products or the rendition of any service other than as specified in an order to the Company which has been accepted or approved by it or within the time and upon the terms and conditions as thereafter specified by the Company.

RESPONSIBILITY FOR SALE AND SERVICE OF THE PRODUCTS

9. The Distributor shall give primary emphasis to the promotion and sale of Products to customers in the Area of Primary Responsibility. Distributor agrees that during the existence of this Agreement it will undertake the promotion and sale of the Products in a conscientious manner, that it will utilize the resources of its entire organization in promptly attending to inquiries and in soliciting new business and that it will in all ways be active and aggressive in promoting and selling the Products and in building up and enlarging interest in the Company and its Products.

10. The Company may refer any inquiries to the Distributor and the Distributor shall respond thereto promptly; Distributor shall handle all complaints promptly and to a successful conclusion.

11. The Distributor shall furnish to the Company such financial statements and other information relating to sales and prospective sales by the Distributor of the Products as may from time to time be requested by the Company.

12. The Distributor shall provide or cause to be provided during the term of this Agreement reasonable servicing of and spare parts and operating instructions for the Products sold by the Distributor.

INVENTORY

13. The Distributor shall from time to time at the request of the Company furnish to the Company a complete inventory of all of the Products held by the Distributor in its inventory.

SALES MATERIALS

14. The Company shall from time to time furnish to the Distributor, at prices to be established from time to time by Company, reasonable quantities of pamphlets, sales promotion literature and other materials of the Company for use by the Distributor in order to enable the Distributor to effectively develop sales of the Products. Distributor is not required to use any particular sales promotions or methods, whether or not suggested or supplied by the Company, in selling the Products.

15. The Company shall guarantee the Products in accordance with and to the extent of written warranties from time to time issued with the Products. The Company shall not be liable to the Distributor or to any other person for liability for loss of time, or for any other consequential or contingent damages arising from the use or resale of the Products. The Company authorizes no one to extend or alter the terms of such warranties, and they are in lieu of all other warranties, express, implied, statutory or otherwise. The Distributor shall save the Company harmless from any and all loss, damage, costs and expenses of whatsoever nature, including attorney's fees, arising from or in any way connected with: (i) any injury to person or damage to property resulting from or in any way connected with the Distributor's possession, use or sale, including demonstration, of the Products; and (ii) with respect to any representations made or warranties given by the Distributor with respect to the Products other than as set forth in this paragraph.

16. If the Products covered by this Agreement include vacuum cleaners, there is attached hereto and made a part hereof a Warranty Replacement Policy which shall be binding on Company and Distributor.

17. The Company reserves the right to make changes or improvements in the mechanism, form, style, name, design, materials or workmanship of the Products and shall have no obligation to make similar changes or improvements in Products theretofore shipped to the Distributor. All orders from the Distributor with respect to which shipments have not been made may be filled with the Products as changed or improved. Further, the Company reserves the right to discontinue any Product.

TRANSFER OF TITLE, RISK OF LOSS

18. Title to the Products purchased by the Distributor shall pass to the Distributor on delivery of such Products by the Company to the carrier, and at such time the risk of loss with respect to such Products shall pass to the Distributor.

TRADEMARKS AND PATENTS

19. The Distributor shall refrain from using either directly or indirectly, in whole or in part, any logo, trademark or trade name of the Company including but not limited to "Interstate Engineering," "Interstate," "'Automatic' Sprinkler" or "A-T-O"; provided however, that while this Agreement is in force Distributor may use the name of the Product in conjunction with the name of the Area of Primary Responsibility.

SUBDISTRIBUTORSHIPS

20. The Distributor may, in order to fully promote the sale of the Products in the Area of Primary Responsibility, establish subdistributorships. Any agreement between Distributor and a subdistributor shall be subject to all of the terms and provisions of this Agreement, and upon expiration or termination of this Agreement such subdistributorships shall likewise expire or terminate.

TERMINATION

21. The Company shall have the right in its sole discretion to terminate this Agreement upon ten (10) days prior written notice, by registered or certified mail to the Distributor at the appropriate address set forth below, if the Distributor or any of its subdistributors should be in default under any of the terms and provisions of this Agreement or should, in the opinion of the Company, fail to adequately promote the sale of the Products or commit an act reflecting adversely upon the Company or its Products or in the case of bankruptcy or receivership of the Distributor. Such ten (10) day period shall commence on the date of mailing such notice and during such ten (10) day period total purchases by Distributor shall not exceed an amount equal to Distributor's average amount of purchases per day in the three (3) months immediately preceding the mailing of notice of termination multiplied by ten (10).

22. In the event of termination or expiration of the term of this Agreement, any funds owing to the Company by the Distributor shall immediately become due and payable. Upon such termination the parties agree that they will use their best efforts to fill all orders which have been accepted prior to the mailing of such notice of termination.

23. Upon the termination or expiration of the term of this Agreement, the Company shall have the right to sell the Products to Distributor's subdistributors, either directly or through a new distributor, and Distributor agrees not to make any contracts with or proposals to its subdistributors which might be in conflict with the rights of the Company under this paragraph.

24. Upon the termination or expiration of the term of this Agreement, the Distributor shall forthwith discontinue the use of all sales promotion literature, pamphlets and other materials furnished by the Company pursuant to Paragraph 14 above.

25. Upon the expiration or termination of this Agreement, the Distributor will forthwith discontinue any and all use of the name of the Product whether in the corporate, partnership or fictitious business name of Distributor or otherwise, the use of which was permitted pursuant to Paragraph 19 above.

26. It is recognized by the parties that as a natural result of Distributor's activities under this Agreement, Distributor will gain the trust, confidence and respect of other distributors and subdistributors of the Products. Therefore, it is agreed that Distributor will not, during the term of this Agreement or subsequent to the expiration or sooner termination of this Agreement, directly or indirectly, induce, attempt to induce, or assist any other person, firm or corporation to induce or attempt to induce, any distributor or subdistributor of products manufactured by the Company to discontinue such distribution of the Company's products for the purpose of distributing in any manner the products of a competitor.

MISCELLANEOUS

27. The Distributor agrees to hold itself out only as an independent contractor and not as an agent, partner, employee or division of Interstate Engineering or A-T-O Inc. In addition, the Distributor shall not make or cause or permit to be made any express or implied representation, oral or written, concerning the nature of its business or of its relationship with the Company which is not true and correct. The Distributor agrees to indemnify the Company and hold it harmless from any liability arising out of any representation by the Distributor or any of its subdistributors which is not in accordance with this paragraph or which is otherwise false or misleading. The Distributor shall not be authorized to execute in the name of the Company or on its behalf any contract, check, note or written instrument, nor to pledge the credit of the Company, nor to otherwise bind or obligate the Company in any way.

28. No waiver or alteration of this Agreement shall be valid unless in writing and signed by the parties hereto, and no waiver, express or implied, by the Company of a default by the Distributor under this Agreement shall be construed as a waiver of any subsequent default and following a waiver, express or implied, a demand for strict compliance thereafter need not be served on the Distributor.

29. Neither the Distributor nor its employees, representatives or subdistributors shall remove or conceal or permit or cause to be removed or concealed from any Product the serial number or other identifying marks placed thereon by the Company.

30. Any sales of the Products by Company to Distributor subsequent to the expiration of this Agreement shall constitute only a day to day arrangement upon the same terms as contained in this Agreement but terminable by the Company at will and without notice.

31. If litigation be instituted under this Agreement or for the collection of monies due to the Company from the Distributor, the Company shall be entitled to reasonable attorneys' fees in addition to any other relief awarded.

32. This agreement constitutes the entire agreement between the parties and no oral representations, claims or warranties made to the Distributor by any agent or representative of the Company shall be binding.

33. If any term or provision of this Agreement shall to any extent be determined to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby. This Agreement shall be governed under the laws of the State of California, shall be binding upon and shall inure to the benefit of the parties hereto and their successors and assigns, and shall not be directly or indirectly assigned or transferred by the Distributor, in whole or in part, to any person, firm or corporation without the express written consent of the Company. The Distributor shall comply with all laws and regulations applicable to the Distributor's activities under this Agreement, and during the term of this Agreement, the Distributor will comply with all reasonable requests of consumer protective organizations with respect to the Distributor's sale of the Products.

34. As used herein, the neuter gender shall include the masculine and feminine, if applicable.

35. The "Area of Primary Responsibility: Areas 100 through 105 in the State of New York

Products: COMPACT CLEANING SYSTEMS

Term: ONE YEAR commencing as of April 1 19 71

36. The Volume requirements are as follows:

96 COMPACT SYSTEMS per month by May 1, 1971.

156 COMPACT SYSTEMS per month by June 1, 1971.

1688 COMPACT SYSTEMS per month by March 1, 1972.

37. Any notice required to be given pursuant to this Agreement shall be addressed as follows:

The Company: Interstate Engineering
A Division of A-T-O Inc.
522 East Vermont Avenue
Anaheim, California 92805

To the Distributor: To the address set forth in the first paragraph of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the day and year first above written.

INTERSTATE ENGINEERING
A Division of A-T-O Inc.

By _____ Company
Robert W. Amacher
President

COMPACT ASSOCIATES, INC.

By _____ Distributor

Note: If Distributor be a corporation, Seal must be affixed.

Exhibit - 4.

PREFERRED FRANCHISE AGREEMENT

E.P. 7/1/70

AGREEMENT made this 23rd day of April 19 69, by and between FAMILY BUYING POWER, INC., a New York Corporation, with offices located at 313 Clinton Street, Hempstead, New York 11550 (hereinafter referred to as FAMILY BUYING POWER) and COMPACT ASSOCIATES, INC. a NEW YORK Corporation, with offices located at 246-14 Jericho Tpke. Bellerose, New York 11426 and HY DELMAN, individually, (hereinafter referred to as FRANCHISEE).

1. FAMILY BUYING POWER hereby appoints FRANCHISEE named herein as an "independent contractor" to actively and continuously promote and sell the FAMILY BUYING POWER MEMBERSHIP in conjunction with products presently sold by FRANCHISEE and subject to the rules and regulations promulgated by FAMILY BUYING POWER to all of which FRANCHISEE agrees. The territory in which the FRANCHISEE will operate in shall be outlined as follows:

225 mile radius of Bellerose, N. Y.

2. The "territory" outlined above shall be reserved exclusively for the FRANCHISEE by FAMILY BUYING POWER, INC., with the exception that in the event FRANCHISEE is a COMPACT Distributor, FRANCHISEE agrees that any distributor selling VANGUARD PRODUCTS within the same territory may be franchised by FAMILY BUYING POWER. In the event the FRANCHISEE is a VANGUARD Distributor, FRANCHISEE agrees that any distributor selling COMPACT PRODUCTS within the same territory may be franchised by FAMILY BUYING POWER. The "territory" shall be reserved exclusively as hereinbefore defined under the following conditions:

a. That FRANCHISEE purchases and pays for a minimum of 30 FAMILY BUYING POWER REGISTRATIONS per month averaged over any four (4) month period.

b. That all FAMILY BUYING POWER Memberships are registered within a reasonable time from the date of sale.

c. That the FAMILY BUYING POWER Membership be included as part of the complete sale by the FRANCHISEE.

3. FAMILY BUYING POWER and FRANCHISEE agree that the term of this Agreement shall be for one year from the date of this agreement. Thereafter, this agreement shall be automatically renewed for an additional term of one (1) year and so on from year to year.

4. FRANCHISEE agrees to secure prior written approval from FAMILY BUYING POWER for all public manifestations, advertising and printed sales materials developed by FRANCHISEE relative to the FAMILY BUYING POWER Program.

a. FRANCHISEE agrees to use all FAMILY BUYING POWER materials pertaining in any manner to the FAMILY BUYING POWER Program in the manner prescribed by FAMILY BUYING POWER and exclusively for and only in behalf of FAMILY BUYING POWER.

5. Upon receipt of the said payment for each FAMILY BUYING POWER MEMBERSHIP, FAMILY BUYING POWER agrees to immediately mail a FAMILY BUYING POWER MEMBERSHIP KIT to said new member and make available the facilities and services of the FAMILY BUYING POWER MEMBERSHIP for a period of one year.

6. FAMILY BUYING POWER agrees to provide its buying services conditioned by the terms, conditions and understandings of membership in FAMILY BUYING POWER as outlined on the reverse side of the MEMBERSHIP CERTIFICATE provided to the Member Family, a copy of which is annexed hereto and is deemed to be and is part of this agreement.

7. FRANCHISEE agrees to buy all Presentation and Promotional Material relative to the FAMILY BUYING POWER PROGRAM from FAMILY BUYING POWER.

8. FRANCHISEE agrees not to enter or become involved in the BUYING SERVICE BUSINESS or copy or simulate the FAMILY BUYING POWER PROGRAM Materials or deal with a competitor of FAMILY BUYING POWER during the term of this agreement and for a period of one (1) year after the termination of this agreement.

9. This agreement shall be interpreted, construed and enforced under and in accordance with the laws of the State of New York.

10. There is no other agreement affecting or qualifying this agreement between the parties hereto their individual members included, written, oral or otherwise other than is contained herein. This Franchise Agreement shall be binding upon all the parties hereto, their respective heirs, administrators, executors, personal and legal representatives, successors and assignees as the case may be. The parties agree that no alteration or amendment or future understanding shall be binding unless in writing and signed by the parties hereto.

THE CORPORATE PARTIES AND THE INDIVIDUALS HERETO HAVE READ THE FOREGOING AGREEMENT AND FULLY UNDERSTAND THE SAME!

IN WITNESS WHEREOF, the individuals hereto have hereunto set their hands and seals and the Corporate Parties have affixed their seals the day and year first above written.

ATTEST: M A Mullis - Secretary — FAMILY BUYING POWER, INC. (CORPORATE SEAL)

Secretary — By [signature] President

WITNESS: X [signature]

COMPACT ASSOCIATES, INC. (Franchisee Company Name)

By [signature] (SEAL) HY DELMAN Title

NOTARY: X [signature]

X [signature] (SEAL) HY DELMAN Individually

SHIRLEY V. KNOWLTON

PLAINTIFFS' EXHIBIT B.

A Division of A-T-O Inc.
INTERSTATE ENGINEERING
822 EAST VERMONT AVE., ANAHEIM, CALIFORNIA 92805 • (714) 772-2811

ANAHEIM COMPACT

ANAHEIM, CALIFORNIA
PRICE SCHEDULE
COMPACT VACUUM CLEANERS
MODEL C-4, C-6, C-7
EFFECTIVE FEBRUARY 9, 1970

(A) FACTORY DIRECT PURCHASES

Base Price per Compact Based on Quantity per Order	PRICES PER UNIT F.O.B. FACTORY Cash with Order or C.O.D.	Open Account Credit
1 - 23	$67.00	$68.00
24 - 47	63.00	64.00
48 - 95	60.00	61.00
96 - 147	57.00	58.00
148 - 247	54.00	55.00
248 - 499	52.00	53.00
500 & Over	50.00	51.00

Purchases will be reviewed by Interstate at the end of each month and prices adjusted to the price applicable to the total quantity of Compacts purchased in that month. The monthly volume price adjustments will not be refunded to any Distributor whose open account credit with Interstate is past due or over the credit limit, but will be applied to a reduction of Distributor's open account balance.

The monthly volume price adjustment will be in lieu of any other volume rebate.

(B) WAREHOUSE PURCHASES

Base Prices

All prices on warehouse withdrawals are the same as Factory Direct purchases, except as follows:

1. Actual freight rate additional.
2. Less freight allowance per zone schedule.
3. Warehouse and handling charges, and taxes, additional.

ALL WAREHOUSE WITHDRAWALS ARE FOR BANK DRAFT OR CERTIFIED CHECK.

ALL PRICES ARE SUBJECT TO CHANGE WITHOUT NOTICE.

(OVER)

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PLAINTIFFS' EXHIBIT G

FREIGHT ALLOWANCE — VACUUM CLEANERS

ZONE	FREIGHT ALLOWANCE
Zone No. 1*	$ .50
Zone No. 2	1.00
Zone No. 3	1.50

*No freight allowance in the following counties of California: Los Angeles, Orange, Riverside and San Bernardino.

(C) SPARE PARTS AND ACCESSORIES PURCHASES

Current Spare Parts and Accessories Price Lists indicate Net Prices, F.O.B. Factory.

All parts, accessories, advertising and sales data are shipped C.O.D.

NOTE: Any variation of above prices and schedules must be approved by the factory prior to shipment.

ALL PRICES ARE SUBJECT TO CHANGE WITHOUT NOTICE

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Exhibit - 7

United States Court of Appeals
for the Second Circuit

376—Affidavit of Service by Mail — Reporter Co., Inc., 1 Park Place, New York, N. Y. 10007

Cheryl Perry Hill, Thelma Lindo, Victoria Raphael, Lurline Rutherford and Ansonia Lewis for themselves and all persons similarly situated

Plaintiffs-Appellants

against

A.T.O. Inc., Family Buying Power Inc., et al.

Defendants-Appellees

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Barry I. Fredericks Esq., being duly sworn deposes and says that he is the attorney for the above named Defendant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at 8 Mill Lane Levittown, New York

That on the 15th. day of October, 1975, he served the within

Brief and Appendix

upon the attorneys for the parties and at the addresses as specified below

1. John C. Gray Jr.
c/o Brooklyn Legal Service Corp. B
152 Court Street
Brooklyn

2. DiFalco Field & Lomenzo
605 Third Avenue
New York

3. Norman S. Langer Esq.
26 Court Street
Brooklyn

by depositing 2 copies to each to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 15th. day of October 19 75

Raymond J. Braddick

Roland W. Johnson,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977